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In The

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1033

CURTIS, INC., and MONFORT PACKING CO.
APPELLANTS

V.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, DENVER-ALBUQUERQUE MOTOR TRANSPORT, INC., and RINGSBY TRUCK LINES, INC. APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, DENVER-ALBUQUERQUE MOTOR TRANSPORT, INC., and RINGSBY TRUCK LINES, INC. APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

Appellants, Curtis, Inc., and Monfort Packing Co., appeal from the judgment of the United States District Court for the District of Colorado, entered January 24, 1964, dismissing their complaint to set aside and enjoin the enforcement of orders of the Interstate Commerce Commission denying the application of Curtis, Inc., for a certificate of public convenience and necessity. Appellants submit this statement to show that the Su-

preme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court for the District of Colorado is reported in 225 F. Supp. 894 (advance sheets). A copy of the opinion is attached as Appendix A. None of the reports, decisions and orders of the Interstate Commerce Commission have been reported. A copy of the report and recommended order of Examiner Myers is attached as Appendix B. A copy of the report and order of the Interstate Commerce Commission, Division 1, is attached as Appendix C. A copy of the report and order of the Interstate Commerce Commission, Division 1, on reconsideration, is attached as Appendix D. A copy of the decision and order of the Interstate Commerce Commission, on reconsideration, is attached as Appendix E.

JURISDICTION

(1) Nature of the Proceeding

This action was brought under the provisions of 28 U.S.C. 1336 to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission denying the major portion of an application of appellant, Curtis, Inc., for a certificate of public convenience and necessity authorizing operation as a common carrier by motor vehicle in interstate or foreign commerce.

(2) Judgment Below and Notice of Appeal

The judgment of the District Court was entered on January 24, 1964, and the Notice of Appeal was filed in that Court by appellants on February 25, 1964.

(3) Statute Conferring Jurisdiction

The jurisdiction of the Supreme Court to review the decision of the District Court by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b).

(4) Cases Sustaining Jurisdiction

Jurisdiction of the Supreme Court to review the judgment of the District Court on direct appeal is sustained by the following cases: *Burlington Truck Lines* v. *United States*, 371 U.S. 156; *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1; *Schaffer Transportation Company* v. *United States*, 355 U.S. 83.

QUESTIONS PRESENTED

1. Whether the Commission erroneously concluded, in the absence of probative evidence thereof, that existing carriers are capable, either directly or through interline service, of meeting the reasonable transportation requirements of the supporting shipper and whether the Commission's order denying substantially all of the application of appellant, Curtis, Inc., is supported by substantial evidence or is arbitrary and unreasonable.

2. Whether a decision and order of the Commission which vacates an immediately preceding order and substitutes therefor a prior, conflicting order, without making a statement of findings and conclusions, as well as the reasons therefor, upon all material issues of fact, law or discretion presented on the record is violative of the provisions of Section 8(b) of the Administrative Procedure Act (5 U.S.C. 1007(b)).

STATEMENT OF THE CASE

Appellant, Curtis, Inc., (Curtis), is a common carrier by motor vehicle of property in interstate or foreign commerce, operating under various certificates of public convenience and necessity issued by the Interstate Commerce Commission in Docket No. MC 113678 and subs thereto. On June 26, 1959, Curtis filed an application under the provisions of Sec. 207 of the Interstate Commerce Act (49 U.S.C. 307) seeking a certificate of public convenience and necessity, authorizing operation in interstate or foreign commerce as a common carrier by motor vehicle, over irregular routes, of meats, packinghouse products and commodities used by packinghouses, from Greeley, Colorado, to points in 37 states.* A hearing on this application was held in Denver, Colorado, on September 24, 1959, before Examiner Mack Myers. Appearing in protest to the application were representatives of eleven motor carriers,[1] Class I Rail-Carriers in Western Trunkline Territory and the Pacific Southwest Railroad Association.

The application was supported by the Greeley Capitol Packing Company, the predecessor of appellant Monfort Packing Company, which, at that time, was in the process of constructing a new meat packing facility at Greeley, Colorado.

* Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and the District of Columbia.

1. Buckingham Transportation, Inc.; Buckingham Express, Inc.; Buckingham Transfer, Inc.; Denver-Albuquerque Motor Transport, Inc.; Bethke Truck Lines; Watson Bros. Transportation Co., Inc.; Centennial Truck Lines, Inc.; Ringsby Truck Lines; Kroblin Refrigerated Xpress; Sooner Freight Lines; and Pacific Intermountain Express Co.

By a report and recommended order served January 25, 1960, Examiner Myers recommended granting substantially all of the application[2] (Appendix B, page 41).

Exceptions to this report and recommended order were filed on behalf of Denver-Albuquerque, Bethke, Kroblin, Sooner and the Buckingham companies. No exceptions were filed by Centennial, Pacific Intermountain Express, Ringsby, Watson and the rail carriers and, with the exception of Ringsby, none of these carriers exhibited any further interest in this proceeding.

As indicated by their exceptions, those carriers having a continuing protest to the application did not even allege that they could serve the points of Phoenix and Tuscon, Arizona; all points in California; Wichita and Topeka, Kansas; Portland, Maine; Detroit, Michigan; Reno and Las Vegas, Nevada; Manchester, New Hampshire; Gallup, New Mexico; points in southern Ohio; points in Oregon (except Portland); Ogden, Provo and Salt Lake City, Utah and Cudahy, Madison and Mil-

2. The Examiner recommended that Curtis be authorized to operate as a common carrier by motor vehicle, over irregular routes, transporting meat, meat products, and meat byproducts, as described in subsection A of Appendix I to the report in Descriptions in Motor Carrier Certificates, 61 M.C.C. 209 and 766, from Greeley, Colorado, to Birmingham Mobile and Montgomery, Alabama; Phoenix and Tuscon, Arizona; Little Rock, Arkansas; Milford and Wilmington, Delaware; Indianapolis, Indiana; Wichita and Topeka, Kansas; Louisville and Lexington, Kentucky; Baton Route, Lake Charles and New Orleans, Louisiana; Portland, Maine; Biloxi, Mississippi; Landover and Salsbury, Maryland; Detroit and Grand Rapids, Michigan; St. Louis and Kansas City, Missouri; Reno and Las Vegas, Nevada; Manchester, New Hampshire; Albuquerque, Gallup and Santa Fe, New Mexico; Philadelphia, Pittsburg and Scranton, Pennsylvania; Olneyville and Providence, Rhode Island; Memphis, Nashville and Knoxville, Tennessee; Ogden, Provo and Salt Lake City, Utah; Richmond and Norfolk, Virginia; Charleston and Fairmont, West Virginia; Cudahy, Madison and Milwaukee, Wisconsin; and points in California, Connecticut, Florida, Georgia, Massachusetts, New Jersey, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Washington and the District of Columbia.

waukee, Wisconsin. Notwithstanding the absence of even an allegation of available service to these points the Commission ultimately denied appellant's application to serve each of them.

On February 16, 1961, the Commission, Division 1, entered its report and order in which it denied substantially all of the application (Appendix C, page 53). Instead of following the examiner's recommendation, the Commission found that Curtis should be granted authority from Greeley, Colorado to New Haven, Connecticut; Savannah, Georgia; Lexington, Kentucky; Boston, Massachusetts; New York City, New York; Knoxville, Tennessee; and Washington, D.C. Except in the dissent of Commissioner Webb (Appendix C, page 65) no mention was made of the fact that the protesting carriers did not even allege that they could provide service to much of the territory to which the application was denied.

Upon receipt of this report and order, Curtis petitioned the Commission for reconsideration to which Kroblin, Sooner, Ringsby, Denver-Albuquerque, Bethke, and the Buckingham companies replied. On August 22, 1961, the Commission, Division 1, entered its report and order on reconsideration (Appendix D, page 69). In this report and order the Commission found that protestant's offers of service were deficient in that no showing had been made as to the willingness or ability of connecting carriers to participate in joint-line movements of the subject traffic. The Commission further found that the shipper should not be required to experiment with joint-line service particularly where protestants collectively could not serve much of the destination territory. Based on these findings the Commission, Division 1, reversed its earlier position and

granted the application to the extent recommended by the examiner (Appendix B, page 41).

Kroblin, Sooner, Ringsby, Denver-Albuquerque and the Buckingham companies, filed petitions for reconsideration of this report and order to which Curtis replied. On May 18, 1962, the Commission sitting *en banc* vacated the Division 1 order of August 22, 1961, and, without making any findings of fact or conclusions of law, granted the application to the same limited extent as Division 1 had done in its original order of February 16, 1961 (Appendix E, page 76).

Curtis's petition for reconsideration of this latest order was denied by the Commission on November 2, 1962. Upon receipt of this order, their administrative remedies exhausted, appellants brought a timely action to the District Court seeking reversal of the Commission's order of May 18, 1962 (Appendix E, page 76), and reinstatement of the Division 1 order of August 22, 1961 (Appendix D, page 69). The Three-Judge District Court upheld the Commission's order and dismissed the complaint.

QUESTIONS ARE SUBSTANTIAL

This proceeding involves two basic questions, the resolution of which is indispensable to well-ordered administrative process. At issue here is a consideration of the obligations imposed upon the Interstate Commerce Commission by the Administrative Procedure Act and whether those obligations have been satisfactorily discharged in view of the extraordinary history of Commission vacillation which has marked this proceeding.

Also involved is the question of the Interstate Commerce Commission's right to deny a shipper the benefits of admittedly necessary motor carrier service in the absence of affirmative proof that the service required is or can reasonably be expected to be available from existing carriers.

ARGUMENT

By Concluding, in the Absence of Probative Evidence Thereof, That Existing Carriers Are Capable, Either Directly or Through Interline Service, of Meeting the Reasonable Transportation Requirements of the Supporting Shipper, The Commission's Order Denying Substantially All of Appellant's Application is Arbitrary and Unreasonable.

The reasoning underlying the Commission's denial of substantially all of appellant's application was expressed in the Division 1 Order of February 16, 1961, as follows:

> "Collectively protestants provide service from Denver to many of the 147 destination points to which shipper now has shipments from Denver, and they desire to participate in the considered traffic. Those protestants having no authority to provide service from Greeley directly to the considered points would interline at Denver with carriers authorized to provide service between Geeley and Denver and would make their equipment available to shipper by leasing it to the interline carriers." (Appendix C, page 62).

The validity of this finding must be considered in light of the state of the record in this proceeding *at the time this report was written*. On review the consideration must be undertaken in this light because the order of the full Commission, dated May 14, 1962,

adopted this earlier finding without qualification or amplification. Therefore the Commission's ultimate decision in this matter must stand or fall on the correctness of this earlier order.

In order to determine whether the record provided any reasonable basis for the above stated findings, the exact interest of the participants to this proceeding must be carefully examined and evaluated as of the date the report in question was written.

It must first be emphasized that not all of the carriers who appeared at the hearing as protestants took exceptions to the Examiner's recommended grant of authority. It has long since been established by the Interstate Commerce Commission that such failure to file exceptions indicates a lack of interest in the subject traffic and is evidence of the fact that the carriers who do not continue their participation in the proceeding will not be adversely affected by the recommended grant of authority. The principle was emphasized in decisions such as *Morgan Extension-Horses*, 82 M.C.C. 116, 117, in which the Commission observed:

> "It is significant that protestants herein failed to file Exceptions to the recommended partial grant of authority, indicating a lack of interest with respect to traffic moving from and to the points indicated therein. It appears that a grant of authority to applicant to serve these states will have no material adverse effect on protestants operations."

Similarly in *Clark Tank Line Co. Extension - Road Oil*, 79 M.C.C. 557, 559, the Commission stated:

> "With respect to the portion of the application now being considered, PIE, the only protestant holding requisite authority to provide service from points in Wyoming to points in southern Idaho, to

> which area supporting shippers products are moving. has not always been able to supply all the equipment needed. This carrier did not except to the grant of authority recommended by the Joint Board which included authority to transport asphalt and road oil from Wyoming to Idaho, nor did it reply to applicant's petition for reconsideration, which is indicative of its lack of further interest in the proceedings."

In *Home Trans. Co., Inc, Extension - Machinery*, 77 M.C.C. 593, 600, the Commission concluded that the granting of an application to the extent recommended by the examiner would enable applicant to render a complete and reliable service to supporting shippers and would not have any material adverse effect on the operations of opposing motor carriers after noting that these carriers had not excepted to the examiner's recommended grant of the application.

Contrary to the District Court's conclusion, the Commission has consistently held that protesting carriers must continue to manifest their interest in a proceeding or create the inference that they will not be adversely affected by the requested authority. See also, *Dallis and Mavis Forwarding Co.*, 67 M.C.C. 351; *Producers Transport, Inc.*, 68 M.C.C. 247.

However, more important, within the scope of this particular proceeding, is the fact that the availability of any type of service from existing carriers, was entirely speculative as far as the supporting shipper's Greeley traffic is concerned. The Commission was indulging in a presumption that existing carriers could, in one way or another, provide the shipper with acceptable motor carrier service. While such speculation may be within the Commission's province, the presump-

tion must necessarily be weakened if not destroyed entirely, when many of the protestants did not even file exceptions to an examiner's report which recommends that the requested authority be granted. While applications for common carrier authority are not contests between competing carriers, neither are they to be occasions for unfounded speculation by the Commission. If there is to be a presumption that existing carriers can and will provide the requested service, the failure of these carriers to manifest interest in a proceeding once the hearing is closed, should at least be sufficient evidence to rebutt the presumption.

Insofar as the carriers who continue to manifest an interest in this proceeding at the time the report in question was written is concerned, the *only* direct service available from Greeley was through Buckingham Transportation, Inc. This carrier offered service in connection with several other separately owned and operated carriers, collectively known as the Buckingham companies. In their joint exceptions these companies alleged the ability to serve Kansas City and St. Louis, Missouri; Portland, Oregon, and points in the state of Washington. The remaining protesting carriers had no authority to originate traffic at Greeley, Colorado. Their offers of service were therefore based upon allegedly available interline arrangements. However, even these carriers did not allege that they were able to provide service to the entire destination area through these interline arrangements.

In its report, Division 1 did recognize a limited interest of certain of the participating protestants when it pointed out that:

> "In their joint Exceptions, the Denver-Albuquerque, Bethke, Buckingham Transportation, Bucking-

> ham Transfer, and Buckingham Express, except only to the Examiner's recommended grant of authority, authorizing operations from Greeley to Birmingham, Mobile, Montgomery, Little Rock, Baton Rouge, Lake Charles, New Orleans, Biloxi, Oklahoma City, Albuquerque, Santa Fe, Memphis, Nashville, Knoxville, Kansas City, St. Louis, Portland, and points in Florida, Georgia, Texas and Washington." (Appendix C, page 54).

Therefore, for purposes of sustaining the validity of the report and order in question, it must be assumed that the Division was at least aware of the limited interest of these carriers, and should have considered this fact in issuing the subject order.

The remaining protestants who excepted to the Examiner's report and recommended order were Kroblin Refrigerated Xpress, Inc., and Sooner Freight Lines, Inc. Although these carriers excepted to the entire recommended grant of authority, several facts about their interest should be emphasized.

Neither of these carriers had authority to originate traffic at Greeley, Colorado. Neither carrier testified that it had made any investigation or arrangements which would permit it to originate the subject traffic. In spite of their alleged interest in all of the subject traffic, the exceptions filed by these carriers belies such extensive participation. For example, in their joint exceptions, it was pointed out that Kroblin could offer a direct service from Denver, Colorado to Indianapolis, Indiana, Grand Rapids, Michigan, Pittsburg, Pennsylvania and all of northern Ohio. Any other service allegedly available through Kroblin would depend upon the participation upon the carrier who is not a party to this proceeding. (Even the name of this carrier is in

some doubt. In his testimony, Kroblin's representative referred to an "Indiana Refrigerator Lines of Muncy, Indiana," while in its exceptions, reference is made to an "Indiana Refrigerator Transport").

Both in its oral testimony and in its Exceptions, Sooner alleged only the ability to serve only points in western Oklahoma and Oklahoma City.

It is virtually an axiomatic principle of commerce law that the willingness and ability of interline carriers to participate in the particular traffic is a matter requiring affirmative proof. This is well settled by decisions such as that in *Joseph Pomporitz, Extension*, 64 M.C.C. 804. In that case, the Commission held:

> "The involved traffic consists chiefly of perishable commodities, requiring expedited handling and protection in transit to and from points, many of which are not on rail lines, or the regular routes of existing motor carriers. Interveners would handle the described traffic by interlining with connecting carriers which have made no showing as to their respective operations or their ability to perform the service needed by the shipper. While we have on occasions taken official notice of the authorities issued to certain carriers, their actual operations and services are matters requiring affirmative proof at the hearing, which is lacking in the instant case."

In *Ploof Transfer Co., Inc., Extension - Lumber*, 79 M.C.C. 215, 220, the Commission refused to consider the available services of motor carriers who did not oppose the application noting:

> "Because there is no evidence of these carriers authority or their willingness and ability to provide the proposed service, we cannot possibly determine to what extent, if any, their services have a bearing on the issues presented."

With respect to allegedly available interline service, the Commission observed in *Transamerican Freight Lines, Inc., Ext. - Madison, Ind.*, 81 M.C.C. 161, 165:

> "Although protestants claim they are able to handle shipments from Madison to all destination points by means of equipment interchange arrangements with other motor carriers, none of the connecting carriers appeared, and as a consequence, the record contains no definite information as to their authority and ability to participate in such movements to points in the area served by applicant. There is, therefore, nothing upon which to base a conclusion that such a through service is actually available, or, if available, that it would prove adequate."

In *E. L. Powell & Sons Trucking Co., Extension Arizona*, 77 M.C.C. 501, 508, the Commission granted the requested authority noting:

> "While this carrier asserts the ability to serve shippers, it would not state locations at which interchange is affected with other carriers since the time it discontinued interchanging at state lines; it was unable to state the location of so-called inspection stations which it allegedly utilizes whenever interchange does not take place at a carriers terminal; and it did not explain satisfactorily the manner in which safety inspection of the equipment is accomplished."

See also *Wetz Extension - Ferroalloys*, 81 M.C.C. 778, 780, in which the Commission held:

> "We do not agree with the statement in the prior report, in the circumstances presented in this proceeding, that it was incumbent upon applicant to prove that the service of a carrier which indicated no interest in providing the proposed service could not meet the shipper's needs."

The Division 1 report completely ignores the principles established by the foregoing cases. Certainly it is unreasonable and arbitrary for the Commission to require a substantial shipper of the highly perishable commodity to rely upon service about which the record is entirely silent. It is one thing to require a shipper to use a service which the record discloses as available. It is an entirely different matter to require the shipper to experiment with a service which, insofar as the record discloses, may be entirely unavailable or completely unsuitable for its particular requirements.

The absence of probative evidence regarding the willingness and ability of the carriers with whom Kroblin would allegedly interline the subject traffic is made all the more critical in this proceeding by the fact that these delivering carriers, would, in the normal course of events, be required to furnish the motive power to pull the Kroblin trailers. The witness for this protestant testified that, in the normal situation, it would interchange only the trailer with the delivering carriers. Obviously such an operation requires close scheduling between the participating carriers in order to insure that the exchange will take place with a minimum of delay. The Court might well ask, what will happen if the Kroblin tractor-trailer reaches the interchange point at other than normal business hours? How can the shipper be assured that the delivering carrier will have the necessary tractors available at the interchange point when the trailer reaches it? While interline or interchange service may not be unsatisfactory *per se*, if it constitutes the exclusive method by which a large shipper is to transport its highly perishable traffic, the record should at least carry some evidence to indicate that the proposed service can and will be performed in

a satisfactory manner. This record contains no such evidence and the Commission's speculation that available service is satisfactory, therefore becomes unreasonable and arbitrary.

The Commission's Order of May 14, 1962, Which Denied Substantially All of the Application Filed in this Proceeding, Contravenes the Provisions of the Administrative Procedure Act by Failing to Include a Statement of Findings and Conclusions, as well as the Reasons Therefor, Upon all the Material Issues of Fact, Law or Discretion Presented on the Record.

The critical order in the lengthy administrative history which surrounds this proceeding is the order of the full Commission made and entered on May 14, 1962 (Appendix E, page 78).

This order vacated the Division 1 order of August 22, 1961, (Appendix D, page 74) which had granted the subject application to the same extent as that recommended by the hearing examiner and substituted the Division 1 order of February 16, 1961 (Appendix C, page 66). This latter order had reversed the Examiner and had denied the application with the exception of authority to serve seven specified points. The order of the Commission entered May 14, 1962, recited no basis for the change of the Commission's decision other than the statement that:

> "*On reconsideration we find* that the evidence considered in the light of the petitions and replies thereto does not warrant a result different from that reached by the Commission, Division 1, in its report and order of February 16, 1961."

Rather than discussing the evidence and otherwise setting forth the reasons for its change in position, the

Commission simply recited consideration of the application and the record and then found that:

> "• • • these petitions and replies thereto raise no new or material matters of fact or law which were not adequately disposed of in the report of the Commission, Division 1, decided February 16, 1961, and are not of such nature as to require the issuance of a report by the Commission discussing the evidence in the light of such pleadings;"

The Commission's orders are, of course, subject to the provisions of the Administrative Procedure Act, 5 U.S.C. 101 *et seq*. *Riss & Co. Inc.*, v. *United States*, 341 U.S. 907; *Chicago & E.T.R. Co.* v. *United States*, 107 F. Supp. 118, *affirmed* 344 U.S. 917; *Atlanta & St. Andrews Lay Ry. Co.* v. *United States*, 104 F. Supp., 193.

It is conceded that the decision and order of the type involved here may in a particular circumstance, be an entirely satisfactory and permissible method of disposing of the issues involved in a proceeding. However, in the particular circumstances involved here, considering the conflicting decisions rendered by Division 1, it is submitted that the use of a short-form decision and order, such as that employed here, does not satisfy the requirements of Section 8(b) of the Administrative Procedure Act.*

As indicated by the excerpts quoted above, the order in question failed to comply with the mandate of the Statute in that it contains no findings or conclusions which account for, explain, or otherwise substantiate

* "All decisions (including initial, recommended, or tentative decicions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." 5 U.S.C. 1007(b)

the Commission's reversal of position. The situation here is closely analogous to that treated in *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411, *appeal dismissed as moot*, 355 U.S. 179. In that case the question was whether the action of the Interstate Commerce Commission in vacating its prior suspension of proposed rail rates was improper. Division 2 of the Commission has entered an order which, after extensive discussion and lengthy findings, had ordered the rates suspended. On reconsideration this order was vacated by an order which made no findings but simply rec ted consideration of the petitions for reconsideration and the replies thereto, "and good cause appearing therefor". The Court reversed the Commission's action in entering the latter order for failure to comply with the mandates of the Administrative Procedure Act. The language of its opinion is particularly pertinent here.

After discussing the findings of Division 2 in its first order, the Court noted:

> "These findings, decisive and significant in nature, made in scrupulous regard for statutory mandate were, by the order of vacation, swept away without the slightest indication of the existence of facts, and adequate description of them, or even the barest statement of reasons underlying the Commission's change of heart. The propriety of its action, on the external record, must be tested under the simple, brief phrase, 'and good cause appearing therefor'."
>
> "If the criptic phrase 'good cause appearing' is a sufficient indication of action, it will be a self-generating bar to any review since, 'the grounds upon which an administrative order must be judged, are those upon which the record discloses that its action was based.' *Securities and Exchange*

Commission v. *Chenery Corp.*, 318 U.S. 80 63 S. Ct. 454, 459, 87 L. Ed. 626. It is precisely because the scope of judicial review is so narrowly limited that administrative agencies must at terms be on the statutory ruberic reveal the basis for their action by which to judge whether it has met the elemental standards of our system and statutory requirements."

The similarity to the instant proceeding is apparent. The Commission's Order of May 14, 1962, swept away the findings of the order of August 22, 1961 "without the slightest indication of the existence of facts, and adequate description of them, or even the barest statement of reasons underlying the Commission's change of heart."

In its report of August 22, 1961, Division 1 had stated:

> "In our opinion this shipper should not be required to experiment with joint-line service which would involve leases of equipment from protestants by carriers authorized to serve Greeley, particularly when such carriers are authorized to serve only a portion of the destination territory from Denver. *But even collectively protestants are unable to serve some of the destination points.* Shippers experience with these carriers from its Denver plant, moreover, appears something less than satisfactory on joint-line service. In these circumstances, a denial of single-line service in the transportation of the involved perishable commodities on the ground that multiple-line service has not been tried, clearly is not justified. We conclude, therefore, that the application should be granted to the extent described in our findings herein."

Nothing contained in the order of May 14, 1962, in any way indicates why these findings and conclusions were not adhered to. In these circumstances a result

similar to that reached in the *Amarillo-Borger* case, *supra* is warranted. In that proceeding, the Court stated that:

> "* * * we are of the clear opinion that whatever the ultimate scope of judicial review might be on a suspension matter, the Commission is obliged in all stages to respect the requirements, the letter and the spirit of the Administrative Procedure Act. Since both it and the general law concerning the sufficiency of Commission action require an adequate statement of the underlying reasons for the action, we think it evident that the order of vacation did not satisfy these requirements. This order vacating the prior one is a part of, and must be read with it. All that it says is that 'good cause appearing' the prior action is rescinded. * * * We do not think the Commission can make serious findings of this nature and then, without more, announce that they no longer exist. The basic facts, the underlying reasons for that action, would require, as a minimum, some discussion of the factors leading the Commission intelligently and is a matter of deliberative judgment in good faith, to contrary conclusions."

Virtually the same situation was presented in *Long Island R.R. Co.* v. *United States*, 140 F. Supp. 823, in which Division 2 of the Commission originally voted to suspend proposed "piggy-back" rates after the Board of Suspension had refused to take that action. Later, on reconsideration, Division 2 vacated its prior suspension orders without giving proper or sufficient indication of its reasons for doing so. Its action in this regard was challenged, and on appeal, was reversed for non-compliance with the dictates of Section 8(b) of the Administrative Procedure Act. See also *Dixie Carriers, Inc.* v. *United States*, 143 F. Supp. 844, *appeal dismissed as moot*, 355 U.S. 179.

As this court recently pointed out in *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156:

> "The Commission must exercise its discretion under Sec. 207(a) within the bounds expressed by the standard of 'public convenience and necessity' * * * and for the courts to determine whether the agency *has* done so, it 'must disclose the basis of its order' and give clear indication that it has exercised the discretion with which Congress has empowered it *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 197. The Agency must make findings that support its decision and those findings must be supported by substantial evidence. *Interstate Commerce Comm.* v. *J-T Transport Company*, 368 U.S. 81, 93; *United States* v. *Carolina Carriers Corporation*, 315 U.S. 475, 488-489; *Chicago M. St. T. & R.R. Co.* v. *United States*, 494 U.S. 499, 511."

In the instant proceeding, appellant has never been apprised of the reason or reasons which prompted the Commission to reverse its former position. It must be remembered that the Order of Division 1 entered August 22, 1961, vacated and set aside the Division's previous order of February 16, 1961. In doing so, however, the Division was careful to detail its reasons for taking such action. Its report recites the facts of the proceeding, makes findings and conclusions based on those facts, and enters an order based upon the recitations contained in the report. This action is fully consistent with the requirements of the Administrative Procedure Act.

On the other hand, the order of the Commission entered May 14, 1962, affords no basis for determining why the Division report of February 16, 1961 is to be preferred over the Division report of August 22, 1961. Appellant is left with two conflicting decisions, one

granting the application to a substantial extent, the other denying it to an equally substantial extent. The hearing examiner, who heard the evidence, observed the demeanor of the witnesses and issued a report and recommended order based upon a consideration of these factors, also recommended a substantial granting of the application. He too made extensive findings as the basis for his recommendations.

A review of the proceedings reveals that, at every stage except the final (and most critical) step, the mandate of Sec. 8(b) of the Administrative Procedure Act is faithfully complied with. The Examiner, citing substantial reasons therefor, recommended a grant of most of the requested authority. Division 1 made findings and conclusions and reversed the Examiner's determination. Upon reconsideration, the Division granted the application to the same extent recommended by the Examiner and recited the reasons for its v[illegible]tion of the former decision. The order of May 14, 1962, which vacated the preceding order and reinstated the previous order of Februay 16, 1961, is utterly devoid of the extensive findings contained in the former orders. The mere recital that the February 16, 1961 order should be reinstated provides no indication why that report should be favored over the August 22, 1961 report and order. The Commission is not free to shroud its decisions in ambiguity. The requirement that the Commission make express findings in all material issues is designed to afford all parties, as well as reviewing courts, the opportunity for intelligent appraisal of the reasons for the Commission's action. Such is not the case here and, as a result, the Commission's orders of May 14 and November 2, 1962 should be stricken down by this Court.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, it is urged that jurisdiction be noted and that the judgment of the District Court be reversed and the case remanded to that Court for disposition consistent with this Court's opinion.

Respectfully submitted,

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PROOF OF SERVICE

I, Donald E. Leonard, one of the attorneys for Curtis, Inc., and Monfort Packing Co., appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the , day of April, 1964, I served copies of the foregoing Jurisdictional

Statement and attached appendices on the several parties thereto, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope, with postage prepaid, to Lawrence W. Henry, United States Attorney, Federal Building, Denver, Colorado, and by mailing a copy thereof in duly addressed envelope with airmail postage prepaid to Archibald Cox, the Solicitor General of the United States, Department of Justice, Washington 25, D.C.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes with airmail postage prepaid to Arthur J. Cerra, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D.C., and Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D.C.

3. On Denver-Albuquerque Motor Transport, Inc., and Ringsby Truck Lines, Inc., intervening defendants, by mailing copies in duly addressed envelopes with first class postage prepaid, to their attorney of record, Edward T. Lyons, Jr., 526 Denham Building, Denver, Colorado, 80202.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 7902

CURTIS, INC., Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

and

DENVER-ALBUQUERQUE MOTOR TRANSPORT, INC. and RINGSBY TRUCK LINES, INC., Intervening Defendants.

FILED United States District Court Denver, Colorado, January 28, 1964

Duane W. Acklie and Richard A. Peterson, Nelson, Harding and Acklie, Attorneys at Law, 14th & J Streets, Box 2028, Lincoln, Nebraska, for Curtis, Inc.; Anthony F. Zarlengo, Zarlengo & Seavy, 803 Majestic Building, Denver, Colorado, for Monfort Packing Company, Intervening Plaintiff; Honorable Lawrence M. Henry, United States Attorney for the District of Colorado, 348 Post Office Building, Denver, Colorado, and John H. D. Wigger, Attorney, Department of Justice, Washington 25, D.C., attorneys for defendant United States of America; Arthur J. Cerra, Assistant Attorney General, Interstate Commerce Commission, Washington, D.C., for defendant Interstate Commerce Commission; Ed-

ward T. Lyons, Jr., 526 Denham Building, Denver, Colorado, for intervening defendants Denver-Albuquerque Motor Transport, Inc., and Ringsby Truck Lines, Inc. Before PICKETT, Circuit Judge, and CHILSON and DOYLE, District Judges.

DOYLE, District Judge.

By this action, the plaintiff seeks to set aside and enjoin the enforcement of orders of the Interstate Commerce Commission denying its application for a certificate of convenience and necessity. The action is brought pursuant to Title 28 U.S.C. §1336. A three-judge district court was convened to hear the cause pursuant to Title 28 U.S.C. §2325.

Plaintiff herein had sought, by application filed June 26, 1959, authority pursuant to Section 207(a) of the Interstate Commerce Act (49 U.S.C. §307(a)) to conduct operations in interstate commerce as a common carrier by motor vehicle over irregular routes, carrying meats, packinghouses from Greeley, Colorado, to all points in 37 states[1] and the District of Columbia.

On March 22, 1963, the Court issued a temporary restraining order enjoining the Commission from canceling the temporary authority previously granted to plaintiff in MC-113678 Sub 21 TA and MC-113678 Sub 24 TA. On March 29, the Court was advised that the defendants had no objection to the entry of a preliminary injunction, and therefore an injunction was en-

1. Authority was sought to the District of Columbia and points in Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin.

tered which remains in effect during the pendency of this action.

This cause has an unusual history in that the Examiner recommended that authority be granted and one division of the Commission agreed with his report while another division disagreed. The application was at last denied by the full Commission.

On September 24, 1959, a public hearing, presided over by an examiner, was held in Denver, Colorado. At this time plaintiff was already authorized to serve, from Denver, the points of Washington, D.C., New York, New York, and Boston, Massachusetts. In addition, plaintiff had another application pending before the Commission seeking additional authority from Denver to points in seven eastern states.

Testimony was offered on behalf of several protesting carriers.[2]

The application was supported by the Capitol Packing Company, the predecessor of Monfort Packing Company which is now an intervening plaintiff in the action and which is plaintiff's sole shipper. The report of the examiner, filed January 25, 1960, found that the present and future public convenience and necessity require the operation of the plaintiff from Greeley, Colorado to points in 37 states and the District of Columbia, as

2. Buckingham Transportation, Inc.; Buckingham Express, Inc.; Buckingham Transfer, Inc. (known also collectively as United-Buckingham Freight Lines); Denver-Albuquerque Motor Transport Inc.; Bethke Truck Lines, Inc.; Watson Brothers Transportation Co. Inc.; Centennial Truck Lines, Inc.; Ringsby Truck Lines; Kroblin Refrigerated Xpress; Sooner Freight Lines; Pacific Intermountain Express Co.; Class I rail carriers in western trunkline territory; and Pacific Southwest Railroad Association.

designated in the application.[3] The Examiner found also that the plaintiff was fit, willing and able to perform the proposed operations. The recommendation was that certification should be granted to the points specified. There was a further recommendation that the application should be denied in certain respects which are not here material.

Exceptions to the entire recommended grant were filed by Kroblin and Sooner. Denver-Albuquerque, Bethke, and the United-Buckingham carriers excepted to the recommended grants only to points in 13 states. Thereafter, on February 19, 1961, Division 1 of the Commission granted the application, but only in part, to points in 6 states and the District of Columbia: New Haven, Connecticut; Savannah, Georgia; Lexington, Kentucky; Boston, Massachusetts; New York, New York; Knoxville, Tennessee; and Washington, D.C. The application was denied in all other respects, Commissioner Webb dissenting. The latter Commissioner was of the opinion that the application should have been granted to the extent recommended by the examiner.

Subsequently, on August 22, 1961, on request of the plaintiff, Division 1 reconsidered its previous findings

3. The examiner's recommended territory was from Greeley, Colorado to: Birmingham, Mobile, and Montgomery, Alabama; Phoenix and Tucson, Arizona; Little Rock, Arkansas; Milford and Wilmington, Delaware; Indianapolis, Indiana; Wichita and Topeka, Kansas; Louisville and Lexington, Kentucky; Baton Rouge, Lake Charles, and New Orleans, Louisiana; Portland, Maine; Biloxi, Mississippi; Oklahoma City, Oklahoma; Baltimore, Landover and Salisbury, Maryland; Detroit and Grand Rapids, Michigan; St. Louis and Kansas City, Missouri; Reno and Las Vegas, Nevada; Manchester, New Hampshire; Albuquerque, Gallup, and Santa Fe, New Mexico; Philadelphia, Pittsburgh and Scranton, Pennsylvania; Olneyville and Providence, Rhode Island; Memphis, Nashville and Knoxville, Tennessee; Ogden, Provo and Salt Lake City, Utah; Richmond and Norfolk, Virginia; Charleston and Fairmont, West Virginia; Cudahy, Madison and Milwaukee, Wisconsin; and points in California, Connecticut, Florida, Georgia, Massachusetts, New Jersey, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Washington, and District of Columbia.

and order. The report, this time written by Commissioner Webb, found that the present and future public convenience and necessity required plaintiff's operations to the full extent of the examiner's recommendations. The order of February 16, 1961 was set aside and an appropriate order was entered.

Finally, in response to joint petitions of the protestants, the proceeding was again reopened for reconsideration; this time by the whole Commission sitting in general session. Upon this reconsideration, the Commission found in a decision and order of May 14, 1962 (Commissioners Webb and Tucker dissenting):

> "That the evidence considered in light of the petitions and replies thereto does not warrant a result different from that reached by the Commission, division I, in its report and order of February 16, 1961, and that the statement of facts, the conclusions, and the findings therein as set forth in the appendix thereto, being proper and correct in all material respects, should be, and they are hereby affirmed and adopted as our own. . ."

The order of Division I of August 22, 1961, was vacated. An order was entered authorizing service to only the 6 states and the District of Columbia, as provided in the February 16, 1961 order. Plaintiff's subsequent petition for reconsideration of the May 14, 1962 order was denied on November 2, 1962. Plaintiff now seeks judicial review of the May 14, 1962 and November 2, 1962 orders, and reinstatement of the August 22, 1961 order.

Essentially, two issues are presented:

I. Whether the Commission's conclusion denying, to a large extent, the application of the plaintiff for a

certificate is based upon adequate findings supported by substantial evidence; and

II. Whether the Commission's decision and order of May 14, 1962, is in violation of Section 8(b) of the Administrative Procedure Act (Title 5 U.S.C. §1007 (b)) in that it adopts the finding of the division.

I.

WHETHER THE COMMISSION'S CONCLUSION IS BASED UPON ADEQUATE FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE

As we recently reaffirmed in the case of *Colorado-Arizona-California Express* v. *United States, et al.*, No. 7988, December 12, 1963 (D. Colo.) — F. Supp. —, the law is settled that an applicant for certification as a common carrier by motor vehicle bears the burden of demonstrating that the present or future public convenience and necessity will be served by the applicant's operations. See also *Filson* v. *I.C.C.*, 182 F. Supp. 675 (D. Colo. 1960), *Robbins* v. *United States*, 204 F. Supp. 78, 81 (E.D. Pa., 1962). Since the phrase "public convenience and necessity" is not defined in the Interstate Commerce Act, and since the purpose of Congress in amending the Act by the passage of the Motor Carrier Act was to "leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity," *I.C.C.* v. *Parker*, 326 U.S. 60, 65 (1945), the Commission is granted a wide degree of administrative discretion in its decisions. However, a basic ingredient in the determination of "public convenience and necessity" is, and has consistently been held to be, whether the existing facilities are inadequate to meet present or future transportation requirements. *Colorado-Arizona-California*

Express v. *United States*, supra; *Hudson Transit Lines, Inc.* v. *United States*, 82 F. Supp. 153, affirmed 338 U.S. 802 (S.D. N.Y., 1948).

The decision of Division I of February 16, 1961, which was adopted by the decision of the entire Commission on May 14, 1962, found that the present and future public convenience and necessity only warranted certification to points in 6 states and the district of Columbia, these being the only destination areas shown to be inadequately served by existing carriers. The bulk of the destination areas designated in the application were concluded to be served adequately. This ultimate finding, or conclusion, must be based upon basic findings supported by substantial evidence, *Capital Transit Co.* v. *Public Utilities Commission* (D.C. Cir., 1954) 213 F. 2d 176, 187, and if such basis is found, we have no need for further examination of the evidence.

A. *The Evidence of Need for Additional Service*

The evidence on behalf of plaintiff's application was presented by only one supporting shipper, the Capitol Packing Company, now known as Monfort Packing Company under which name it is an intervening plaintiff in this action. At the time of the hearing, Capitol Packing Company of Denver and Capitol Packing Company of Greeley were closely affiliated corporations, the latter of which was constructing a new slaughterhouse, to open in March, 1960, in Greeley, Colorado, a community approximately 50 miles north of Denver. The experiences of the Denver branch of the company were relied upon to support the estimates of the company's future needs for transportation. The initial production of the Greeley plant was estimated to be 16,700,000 pounds of meat and meat products monthly,

which was a figure forty per cent higher than the production of the Denver plant and which would make Capitol the largest plant in the Greeley area, providing approximately forty truckloads of meat and meat products per week to the motor carrier industry. The balance, about 65 to 70 per cent of all shipments, was expected to move by rail. The shipper testified that it would ship from Greeley to 151 specified points in 37 states and the District of Columbia. All but four of these points, it appeared, could be reached more or less satisfactorily from Denver. The four points to which service was found to be unavailable were listed in the final grant of authority.

The witness for Capitol, Mr. Averch, testified that his company desired better transportation service than had been available, due to the competitive nature of the packing business and the fact that there were not enough carriers with enough equipment in Denver to meet its needs. Seventy-two hour delivery to far-ranging points in the United States allowed Capitol to deal in kosher meats and to take advantage of fluctuating market conditions as well as to avoid shrinkage. Interline service would appear to be frequently necessary from Greeley, due to the fact that few interstate carriers are authorized to serve Greeley, and the witness expressed dissatisfaction with interline service in general. He gave testimony as to the type of refrigerated equipment necessary and the past difficulties of the company in obtaining equipment from the authorized carriers. Exhibits were introduced showing where the traffic would move and the witness discussed the degree to which transportation costs were significant in Capitol's operations. Testimony was offered as to the desirability of a Greeley-based carrier, having terminal,

loading, and steam-cleaning facilities in the immediate area of the plant. It further appeared that the addition of lamb and sheep products to the company's product line might broaden the market areas to which the company desired transportation service. However, no points needing additional service were listed.

The examiner found this showing to be sufficient to prove that the present and future public convenience and necessity require plaintiff's operations.

B. *The Evidence of Adequacy of the Existing Service*

It is undisputed that the supporting shipper had been able to reach from Denver all but four of the 151 points to which it desired shipments. Although there was evidence of difficulty in obtaining equipment from the authorized carriers, there was no evidence of any serious loss of business or even serious inconvenience due to this difficulty. Because there appeared to be no dispute as to the authorities and abilities of the existing carriers, the Commission did not give detailed consideration to the protesting shippers' abilities to serve each and every destination point. Because the burden of showing need is upon the applicant, we cannot agree that the Commission erred in failing to require affirmative proof of these authorities and their interline connections. To require such proof would place upon the Commission a burden of needlessly sifting through certificates of authority and interline agreements which are not even in controversy.

The shipper expressed a willingness to use interline services from Greeley if such service were shown to be responsive to its needs. These services would generally transport shipments to Denver, where they would be

interlined with the carriers having the proper authorities.

The record amply demonstrates that those protestants which collectively served most of the specified destination points had access to additional equipment if it became necessary to supplement the large fleets which they had on hand. Each protestant expressed a willingness and a desire to participate, to the extent it was authorized, in the contemplated traffic. We cannot agree with plaintiffs' argument that failure on the part of one of the protestants to file exceptions to the report and recommended order of the examiner indicated a change of heart or a lack of interest in providing service to the supporting shipper. This surely cannot be a standard of judgment, for not only would this be an "inference drawn from a fact susceptible to other inferences," *Colorado-Arizona-California Express* v. *United States*, supra, but would place a burden of practically interminable litigation upon every existing shipper which decided to protest an application.

Those protestants which served mainly as intrastate carriers, whose function it would be to pick up shipments in Greeley and to interline them with interstate carriers in Denver, presented evidence that they would obtain additional equipment in Denver from the interstate carrier involved; would drive the equipment to Greeley in one and one-half to two hours; would pick up the shipment; drive back to Denver; and interchange vehicles with the interstate carrier. Both the intrastate protestants and the interstate protestants expressed a desire to perform this service and felt that they could perform satisfactorily. Since this type of service had not been tried, the Commission could find no substantial basis for finding that it was inadequate or un-

satisfactory. We agree with the Commission that there is no such basis in the record. Interline service between two, or even among three carriers, cannot be said to be per se inadequate. *Ayer* v. *United States*, 139 F. Supp. 440 (N.D. Ga., 1956); *Colorado-Arizona-California Express* v. *United States*, supra. This is particularly true where, as here, transportation is sought to very distant points.[4]

We have here a situation similar to the extreme example given in *California Express*, supra. Here also there is convenience to the supporting shipper; the only basis for questioning the adequacy of the existing carriers' ability to perform the necessary service is one of time and directness of routes. These matters were weighed by the Commission and found to be of less importance to the public's convenience and necessity than they were to the supporting shipper's convenience and necessity. But we are not here concerned with the weight given to the evidence by the Commission, the soundness of the reasoning by which the conclusions were reached, or with whether the findings are consistent with those made in similar cases. *Virginian R. Co.* v. *United States*, 272 U.S. 658 (1926); *Universal*

4. In the *Colorado-Arizona-California Express case*, we noted: ". . . Were we to accept plaintiff's argument, [that the Commission should not be allowed to consider interline arrangements in its consideration of adequacy of existing service] any motor carrier who could show that no single, direct-line service existed to any specified point in the United States could apply for, and would necessarily be granted certification without a further showing of inadequacy of the interline service available. For instance, a carrier who produced testimony of a shipper showing a need for service to Wilkes Barre, Pennsylvania, from Denver, and showing that no single shipper served that city directly, would have sustained this burden of proof, although further testimony might show that the available interlining carriers serve Wilkes Barre, Scranton, and the surrounding cities more than adequately. We think that Congress intended this decision to be one for administrative determination, not to be overturned by the courts except in the absence of substantial evidence supporting the Commission's findings."

Camera Corp. v. *National Labor Relations Board,* 340 U.S. 474, (1951).

Plaintiff earnestly and somewhat persuasively argues that any determination which the Commission could make under the circumstances present here, where services had not been tried on the bases which either plaintiffs or protestants seek to perform, "entails a prophecy so far as future requirements are concerned." This however, is not fatal. *United States* v. *Detroit, etc. Navigation Co.*, 326 U.S. 236 (1945). In that case the Supreme Court, in upholding a grant of certification, held:

> ". . . If the Commission were required to deny these applications unless it found an actual inability on the part of existing carriers to acquire the facilities necessary for future transportation needs. a limitation would be imposed on the power of the Commission which is not found in the Act. The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. . . Forecasts as to the future are necessary to the decision." (326 U.S. at 240-241)

Similarly, we cannot delimit the power of the Commission by requiring it to find an actual present ability on the part of the existing carriers to render the service which may be necessary in the future. The Commission's finding that the shipper ". . . has an adequate motor carrier service available from Greeley. . ." does involve an element of prediction which could well fail to materialize. Nevertheless, such prediction could be rationally made upon the evidence before the Commission. It therefore must follow that the Commission's finding that the shipper ". . . has an adequate motor

carrier service available from Greeley to those points to which it now ships from Denver" is supported by substantial evidence.

The Commission stated, as a matter of policy, that it is ". . . fundamental that existing carriers should be afforded an opportunity to transport all traffic which they can handle adequately, efficiently, and economically." Such policy is indeed consistent with the National Transportation Policy. Plaintiff's assertion that if the estimate of future needs does not prove to be sound a re-application would be useless since the Commission would require proof of changed circumstances, does not necessarily hold. The realities of practice may themselves reveal the changed circumstances. Plaintiff may be able to show that the available carriers can not perform in accordance with its promises.

Since the cases cited supra are clear as to which party must bear the burden of showing that the public convenience and necessity favor the proposed service; and since the evidence in the record is ample to show that all of the destination points in controversy could be served with reasonably adequate speed and volume by the existing carriers, we can only conclude that the Commission did not err in holding that plaintiff, Curtis, failed to meet the demands of proof of convenience and necessity.

II.

WHETHER THE COMMISSION'S FINAL DECISION IS LACKING IN ESSENTIAL FINDINGS OR REASONS

Plaintiff attacks the Commission's decision and order of May 14, 1962, on the ground that the decision failed

to give adequate reasons for reversing the August 22, 1961, decision of Division I, by which certification had been granted. The relevant portion of the final decision, which has been set out earlier in this opinion, recites that the entire Commission felt that the evidence did not warrant the broad grant of authority as ordered by Division I, and adopted the earlier decision of Division I, dated February 16, 1961. Plaintiff argues that this procedure contravenes the requirement of "findings and conclusions as well as the reasons or basis therefor" as provided in Section 8(b) of the Administrative Procedure Act. (Title 5 U.S.C. §1007(b)).

It should first be noted that the whole Commission is vested with authority to reverse, change, or modify a decision of a division of the Commission. Section 7(a), Administrative Procedure Act (5 U.S.C. §1006 (a)); Paragraphs 6 and 7, Section 17, Interstate Commerce Act, (49 U.S.C. §17, pars. 6 and 7). But it is plaintiff's contention that due to the Commission's vacillation, the final decision, if it reverses the immediately prior decision, must be accompanied by not only the findings of fact and conclusions of law leading to the final order, but must also include at least one reason for the fact that the whole Commission decided to reverse.

As authority for this position, plaintiff cites *Amarillo-Borger Express* v. *United States*, (N.D. Tex., 1956), 138 F. Supp. 411; judgment vacated as moot, 352 U.S. 1028; *Dixie Carriers, Inc.* v. *United States*, (S.D. Tex., 1956), 143 F. Supp. 844; and *Long Island R. Co.* v. *United States*, (E.D., N.Y. 1956) 140 F. Supp. 823. But in none of these cases in which the courts reversed summary vacations of prior orders, did the vacating orders have a prior reasoned opinion to fall back upon and to

adopt as its own. Essentially, the plaintiff is seeking the subjective reasoning of the Commission. "There is no requirement that the Commission specify the weight given to any item of evidence or fact or disclose mental operations by which its decisions are reached." *Baltimore & O.R. Co.* v. *United States*, (1936) 298 U.S. 349, 359. Our review can extend only to the Commission's final, definitive report and order of May 14, 1963, and not to the preliminary stages or preparatory steps. *Lang Transportation Corp.* v. *United States* (S.D., Calif., 1948) 75 F. Supp. 915. It should be noted that this decision was reached upon the first consideration by the entire Commission and that of eleven members serving on that body, only two have at any time endorsed the view that the application should be granted to the extent recommended by the examiner. The decision adequately adopted a prior reasoned report which had set out a sufficient basis for the action taken. There was no necessity for further explanation as to the cause of the Commissioners' votes.

Nor can we find any abuse of discretion in the Commission's November 2, 1962 denial of a rehearing.

ACCORDINGLY, the relief prayed for by the plaintiff and the intervening plaintiff must be denied and the complaint must be dismissed.

Pursuant to the opinion of the three-judge Court convened herein, it is

ORDERED:

1. That the application for a permanent injunction be denied;

2. That the Order Granting Preliminary Injunction entered on March 29, 1963, be dissolved;

3. That the action and the complaint of the plaintiff and the intervening plaintiff be dismissed at the plaintiffs' costs.

DATED at Denver, Colorado, this twenty-fourth day of January, A.D. 1964.

BY THE COURT:

JOHN C. PICKETT, Judge
United States Court of Appeals

HATFIELD CHILSON, Judge
United States District Court

WILLIAM E. DOYLE, Judge
United States District Court

APPENDIX B

INTERSTATE COMMERCE COMMISSION

Served January 25, 1960

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D.C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. The stated specific time periods apply to all parties and give full effect to Rule 1.21(c) of the General Rules of Practice to the extent, if any, the provisions of such rule otherwise would be applicable to this proceeding.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate, permit, or license has actually been issued. The certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of

the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-113678 (Sub-No. 7)

CURTIS, INC. EXTENSION - GREELEY, COLO.

REPORT AND ORDER RECOMMENDED BY MACK MYERS, HEARING EXAMINER

By application filed June 26, 1959, as amended, Curtis, Inc., of Denver, Colo., seeks a certificate of public convenience and necessity authorizing operation in interstate or foreign commerce as a common carrier by motor vehicle of meats, packinghouse products and commodities used by packinghouses, and empty containers or other such incidental facilities used in transporting the above described commodities from Greeley, Colo., to points in Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Lousiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and the District of Columbia, over irregular routes.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on September 24, 1959, at Denver, Colo. Buckingham Transportation, Inc., Buckingham Express, Inc., Buckingham Transfer, Inc., Denver-Albuquerque Motor Transport, Inc., Bethke Truck Lines, Watson Bros. Transportation Co., Inc., Centennial Truck Lines, Inc., Ringsby Truck Lines, Kroblin

Refrigerated Xpress, Sooner Freight Lines, Pacific Intermountain Express Co., Class I rail carriers in western truckline territory and Pacific Southwest Railroad Association oppose the application.

Applicant is authorized to operate as a common carrier by motor vehicle, over irregular routes, of meats, meat products, and meat byproducts from Denver to Washington, D.C., New York, N.Y., and Boston, Mass. It also has pending a recommended report covering the same commodities as described by the Commission in Subsection A of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 from Denver to Baltimore, Md., Hartford and New Haven, Conn., Newark and Carteret, N.J., Philadelphia, Pa., Springfield and Worcester, Mass., Providence, R. I., Mt. Kisco, N.Y., and points in Long Island, N.Y., except New York, N.Y. Exceptions have been filed to this report.

Applicant operates 20 tractors, of which it owns 10 and leases 10. It also operates 23 trailers, of which it owns 9 and leases 14. Applicant maintains office, repair, maintenance, and cleaning facilities at Denver and utilitizes a public truck stop at North Bergen, N.J., in its present operations. If the instant application is granted, it proposes to establish a Greeley Division with a dispatch office, cleaning facilities and equipment stationed there. A terminal would be built on about 5 acres of ground. Additional equipment will be purchased or leased. Independent garages are available in Greeley which will be used for mechanical services. A balance sheet as of June 30, 1959, shows total assets of $311,776, including current assets of $58,421, total liabilities of $220,220, including current liabilities of

$42,544, and total capital and retained earnings of $91,560. For six months ended June 30, 1959, applicant's operations yielded a net income of $14,215. It is fit and able, financially and otherwise, to perform the proposed operations.

Applicant presently performs a sleeper-cab service from Denver to Boston and consistently maintains a third morning delivery and it believes such service can be performed from Greeley to the farthest point sought in the instant application. Applicant solicits return movements of exempt commodities to avoid empty mileage and also leases equipment to authorized common carriers. The leasing of equipment and the transportation of exempt commodities to Denver or other points in the return movements constitute important sources of revenue. Contracts for return movements on a similar basis are and have been made at present destination points now served and applicant's president is of the opinion that similar arrangements for the use of its equipment on return movements can be made from destination points sought herein. Deadhead movements will be made if necessary. If the instant application is granted, applicant will require some additional equipment, either by purchase or lease. In either case, it is in position to secure same. To finance purchase of equipment, it has established credit with local banks. It can also obtain additional capital by the sale of stock.

The application is supported by Capitol Packing Company, hereinafter called Capitol. This company operates a slaughtering plant at Denver and processes cattle and lambs. It has under construction a similar plant in Greeley which will be completed in March 1960. The new plant at Greeley will be the latest type of slaughtering plant in the country. It will have complete auto-

mation which will facilitate increased production at a lower cost and the capacity of this plant will surpass the present production of the Denver plant, by 40%. The initial production figures for the proposed plant will be approximately 10 million pounds of beef; 990,000 pounds of hides, 1,150,000 pounds of offals (edible); 1,000,000 pounds of offals (inedible), making a total of 13,000,000 pounds of beef meat. The production of sheep products will be about 2,500,000 pounds of dressed lambs; 600,000 pounds of sheep pelts; 400,000 pounds of sheep offals (edible;) 225,000 pounds of sheep offal (inedible), making a total of 3,700,000 pounds of sheep products. This production will be sold, based upon its present experience in the meat business in every State where its products of the Denver plant are presently sold. In addition to the beef business, the lamb business will bring in new cities where this shipper has previously made no sales of beef products. An exhibit was submitted in evidence which was prepared from the records and a survey of the markets. Such exhibit shows the customer location in the States here involved which have been served out of Denver and the anticipated production of the Greeley plant to be sold in the same localities and more. Service to some of the points in the exhibit has been requested, but it has not been able to handle this traffic because of the lack of transportation facilities. Transportation has become one of the largest factors because meat products in general are volume items and perishable ones and must be moved quickly and to the customer's satisfaction. To take advantage of market conditions based upon the element of time in transportation both rail and motor carrier must be used It has obtained many new accounts because of no rail sidings and split deliveries by motor carrier service. A study has been made as to what

transportation facilities would be used out of Greeley. It has been planned to use rail service in 65 to 70 percent of the cases and to use motor carriers for the balance. The reason for truck service in addition to rail is the availability of equipment which facilitates the loading and expedites the movement of the traffic. Its equipment requirements for service by motor carrier includes 35 to 40 foot insulated mechanically refrigerated trailers, with longitudinal rails, floor racks, and meat hooks. It prefers that tandem tractors and trailers with sleeper cabs be used. The meat packing industry is highly competitive, and to maintain its competitive position with packers in other cities it requires a third-morning delivery service. Interline service is not desirable and has proven unsatisfactory from Denver. While no traffic has moved from Greeley in any service it is presumed such interline service would also prove unsatisfactory, especially if it would move to Denver and there be interlined with another carrier. There has been a shortage of equipment for this class of traffic at the Denver plant. The granting of this application would have no effect on the use of rail service. It is believed that the rail service would continue as in the past. Rail service has its advantage in moving perishable traffic to certain customers who request it. Motor carrier service would enable shipper's customers to carry smaller inventories. It also permits customers to obtain weekend deliveries. Shipper has experienced increased demand for motor carrier service.

Capitol utilizes the service of many existing motor carriers in the Denver area and would use the carriers in the Greeley area to the extent that they would furnish the types of equipment needed and operate in a direct service. It is now using leased equipment in

split delivery service and to areas not served by certificated carriers out of Denver. Applicant will have any number of vehicles available to shipper at Greeley upon a couple of hours notice. Shipper needs the additional service from Greeley and believes applicant can give the same service it is now performing from Denver. This is the reason for supporting the instant application. Shipments will be made to the points shown in the exhibit and distribution made from there. Shipments are made in truck-load lots of 25,000 pounds or more. Capitol ships substantial meat traffic to the destination points sought herein from its Denver plant. It now contemplates shipping a larger volume of such traffic from its new plant now under construction at Greeley. Applicant and the opposing motor and rail carriers now perform service for this shipper out of Denver. The evidence discloses that the shipper proposes to ship a rather large volume of meat products both by rail and motor vehicle to numerous customers located in a wide area of the States sought in the application. Accordingly, it must have adequate motor carrier facilities to move the proposed traffic. It appears that the available motor carrier service available is inadequate to meet all of the transportation requirements of the shipper and from the evidence adduced additional service will be required. The supporting shipper has shown a need for the service proposed herein based on the relative large volume of traffic shipper expects to move upon completion of its plant. The examiner is further convinced that such a need is not too vague nor speculative to warrant a grant of the authority as here recommended. Here we have the future public convenience and necessity to consider. It is clear that the shipper hopes to sell its products in larger quantity to present

customers now served out of Denver as well as to acquire potential customers in the States here involved. The Commission has in the past given consideration to the potential increase and expansion of markets for relatively new traffic and has taken cognizance of the difficulty of shippers to specify with complete exactness the volume of the involved commodities to be moved from a proposed origin point to a given area. While there have been estimates made of the volume to be transported, in the circumstances and considering the wide range of destination States and deemed expansion of sales and production, it might be said that such estimates may prove to be very conservative.

The protesting motor carriers herein cannot serve the shipper with a direct service to all the destination points involved. Many of them do not serve Greeley at all but are willing to interchange the traffic at Denver. In all cases the traffic would have to be interchanged with connecting carriers either at Denver or some other connecting points and in many instances the interchange would have to be made several times to serve the more distant points. It is not contemplated to divert any of the proposed traffic from the rail carriers where the time element is not involved. As a matter of fact, it was stated by the shipper that the rails would get some 60 to 65 percent additional tonnage through the production of the new plant.

Shipper contends that it needs a third-morning delivery service to the more distant points. With respect to the adequacy of existing service it is evident that the joint-line motor carriers utilized in the past have been unable to afford third-morning delivery. To serve these destination points in interline service the mileage which must be traversed would involve a degree of

circuity through required tacking at various points which would not permit definite third-morning delivery to distant points. Another angle is the delays which would occur and the obtaining of equipment from these carriers when needed. Also applicant's authority is limited to meat transportation and it specializes in this type of transportation. Shipper has found applicants' service in the past to the territory it now serves to be excellent. The extension of this service to these additional points proposed herein would permit applicant to render a more flexible service in connection with split deliveries to a larger number of points. Furthermore it is essential to enable the shipper to retain the business of present customers who require more expeditious motor carrier deliveries. All factors considered, the examiner is of the opinion that a need exists for the proposed service, and that accordingly the application should be granted, to the extent indicated in the findings herein.

There has been no showing that any empty containers would be involved on return movements. It is noteworthy that shippers business will be the general slaughtering of cattle and lambs and the processing of "offals" produced in connection therewith, which includes a number of meats products and meat byproducts as set forth in subsection A of appendix I to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209. This is a term which is difficult to interpret precisely for commodity description purposes; therefore, the authority herein recommended will be for meat, meat poducts, and meat byproducts as described in that report which will coincide with applicant's present authority from Denver.

Appendix

The examiner finds that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of meat, meat products, and meat byproducts, as described in subsection A of appendix I to the report in *Description in Motor Carrier Certificates*, 61 M.C.C. 209 and 766, from Greeley, Colo., to Birmingham, Mobile and Montgomery, Ala., Phoenix and Tuscon, Ariz., Little Rock, Ark., Milford and Wilmington, Del., Indianapolis, Ind., Wichita and Topeka, Kans., Louisville and Lexington, Ky., Baton Rouge, Lake Charles, and New Orleans, La., Portland, Maine, Biloxi, Miss., Oklahoma City, Okla., Baltimore, Landover, and Salisbury, Md., Detroit and Grand Rapids, Mich., St. Louis and Kansas City, Mo., Reno and Las Vegas, Nev., Manchester, N.H., Albuquerque, Gallup, and Santa Fe, N. Mex., Philadelphia, Pittsburgh and Scranton, Pa., Olneyville and Providence, R.I., Memphis, Nashville and Knoxville, Tenn., Ogden, Provo, and Salt Lake City, Utah, Richmond and Norfolk, Va., Charleston and Fairmont, W. Va., Cudahy, Madison and Milwaukee, Wis., and points in California, Connecticut, Florida, Georgia, Massachusetts, New Jersey, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Washington, and the District of Columbia.

The examiner further finds that applicant is fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder; that an appropriate certificate authorizing such operations should be granted; and that in all other respects the applications should be denied.

It is recommended that the appended order be entered.

By Mack Myers, Hearing Examiner.
(Signature) Mack Myers

Recommended by Mack Myers, Hearing Examiner.
(Signature) Mack Myers

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the day of , A.D. 1960.

No. MC-113678 (Sub-No. 7)

CURTIS, INC. EXTENSION - GREELEY, COLO.

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That upon full compliance with the requirements of Sections 215, 217, and 221 (c) of the Interstate Commerce Act, and with our rules, and regulations thereunder, a certificate be issued to applicant authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities described, and in the manner described in the findings in the said report.

It is further ordered, That the application in all other respects be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

Harold D. McCoy,
Secretary.

(SEAL)

APPENDIX C

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION

No. MC-113678 (Sub-No. 7)

CURTIS, INC., EXTENSION - GREELEY, COLO.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, WEBB, AND HERRING

BY DIVISION 1:

Exceptions to the order recommended by the examiner were filed by certain protestants, and applicant replied. Our conclusions differ somewhat from those recommended.

By application filed June 26, 1959, as amended, Curtis Inc., of Denver, Colo., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of meats, packinghouse products, and commodities used in packinghouses from Greeley, Colo., to points in Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and the District of Columbia and

of empty containers on return. A number of rail and motor carriers oppose the application.[1]

The examiner recommended that applicant be granted authority to transport, over irregular routes, meats, meat products, and meat byproducts, as descibed in Subsection A of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, 766, from and to the points set forth in the appendix hereto.

In their joint exceptions Denver-Albuquerque, Bethke, Buckingham Transportation, Buckingham Transfer, and Buckingham Express except only to the examiner's recommended grant of authority authorizing operations from Greeley to Birmingham, Mobile, Montgomery, Little Rock, Baton Rouge, Lake Charles, New Orleans, Biloxi, Oklahoma City, Albuquerque, Santa Fe, Memphis, Nashville, Knoxville, Kansas City, St. Louis, Portland, and points in Florida, Georgia, Texas, and Washington. Kroblin and Sooner, in their joint exceptions, except to the entire recommended grant of authority. These protestants contend (1) that existing service has not been shown to be inadequate to meet shipper's reasonable transportation needs, (2) that applicant is financially unable to provide the proposed service, and (3) that applicant has failed to show that it can conduct the proposed operation economically.

1. Buckingham Transportation, Inc., Buckingham Express, Inc., Buckingham Transfer, Inc., Denver-Albuquerque Motor Transport, Inc., Frederick A. Bethke, doing business as Bethke Truck Lines, Watson Bros. Transportation Co., Inc., Centennial Truck Lines, Inc., Ringsby Truck Lines, Inc., Kroblin Refrigerated Xpress, Inc., Sooner Freight Lines, Inc., Pacific Intermountain Express Co., Class I Railroads in Western Trunk Line Territory, and the Pacific Southwest Railroad Association, hereinafter called Buckingham Transportation, Buckingham Express, Buckingham Transfer, Denver-Albuquerque, Bethke, Watson Bros., Centennial, Ringsby, Kroblin, Sooner, PIE, and rail carriers, respectively.

With respect to their contention concerning the adequacy of existing service, protestants argue (1) that each of the carriers involved in these exceptions is able to provide third-morning delivery service from Denver to those points they are authorized to serve; (2) that the short distance between Greeley and Denver over which the traffic must be interlined is of no consequence; (3) that shipper admitted it would use the interline service if sufficient equipment could be made available; (4) that protestants are willing to furnish the necessary equipment; (5) that there would be no material delay in placing the equipment at shipper's plant at Greeley; (6) that applicant failed to establish a need for a more flexible service than is now available; (7) that protestants are able to provide split delivery service to all points listed by shipper as requiring split deliveries in the past; and (8) that existing service should be tried before a new competitive service is authorized. In their exceptions, Kroblin and Sooner also assert (1) that even in those instances in which joint line service involving interchange at points in addition to Denver and in which protestant's route may be circuitous, it is not shown that the required third-morning delivery could not be accomplished by protestants; (2) that the supporting shipper is not entitled to single-line service to all points involved; (3) that shipper has been able to ship its traffic from Denver to all but four of the points to which it has sought a motor carrier service; (4) that shipper support of this application is based on rate considerations and applicant's status as a "captive" carrier of this shipper and (5) that when considering the vast destination territory, the volume of traffic, and applicant's financial condition, protestants are actually in a better position than applicant to provide any service required.

Appendix

With respect to their contention concerning the economic feasibility of the proposed operation, protestants argue (a) that applicant's expected return movement of so-called exempt commodities is based on conjecture inasmuch as applicant has no experience in transporting "exempt" commodities from points in most of the destination territory involved in this application and (b) that it has no agreements with other motor carriers to lease its vehicles to them for return movements. Kroblin and Sooner also assert that applicant's plan to lease its vehicles to authorized carriers for return movements is not in furtherance of the purpose of this Commission's leasing regulations and that applicant's plan to transport "exempt" traffic on return is not consistent with a common carrier's obligation to serve the public without depending on this type of traffic as a condition precedent to its operation. They urge in addition that applicant's statement that it now provides third-morning service from Denver to Boston is of no probative value because it is self-serving and otherwise unsubstantiated.

As for their contention concerning applicant's financial fitness, protestants argue that to perform a complete service to the extent of the authority recommended by the examiner, applicant must obtain substantial financial support to obtain the necessary equipment; that applicant failed to affirmatively show that it could obtain sufficient financial aid; and that applicant's self-serving statements in this regard are of no probative value without supporting evidence.

In addition to the above contentions and arguments Denver-Albuquerque, *et al*, maintain that the proposed service is that of a contract carrier; and, since applicant

would be serving the supporting shipper at Denver as a common carrier and at Greeley as a contract carrier, if applicant is granted authority as a contract carrier herein, it would constitute dual operations, subject to the evils of discrimination. Certain other arguments were advanced in the exceptions of these protestants which were based on erroneous production figures, and accordingly they are without merit.

Kroblin and Sooner in their exceptions state that applicant is seeking authority to provide service to Baltimore, Philadelphia, and Providence which it is also seeking in another application. While applicant did seek authority to serve the above mentioned points in another application, the origin from which it sought to serve these points was Denver, which is not involved herein. Moreover, the application has been denied. No. MC-113678 (Sub-No. 4), *Curtis Inc., Extension - Baltimore, Md.,* M.C.C. (decided April 5, 1960).

In reply, applicant challenges each of the arguments of protestants and argues (1) that none of the protestants filing exceptions are able to provide direct service from Greeley to those destination points in the recommended grant of authority, (2) that interline service with interchange at Denver is unsatisfactory because delays would certainly occur in supplying equipment at Greeley from protestant's Denver terminals, (3) that single line service is required because of the perishable nature of the commodities and to enable shipper to meet competition, (4) that shipper requires a carrier authorized to provide a complete service, thereby making feasible its stationing of equipment at shipper's plant, and its making split deliveries, (5) that exist-

ing service is inadequate to meet shipper's needs from Denver, (6) that assuming, *arguendo*, that the service of certain protestants is satisfactory from Denver and that interline service between Denver and Greeley would meet shipper's needs, the authorized services of these carriers covers only a portion of the destinations sought and much of the available service would involve circuitous operation and three-line service, (7) that a grant of the authority sought would have no adverse effect on existing carriers because they have not been participating in this traffic, (8) that the service proposed by applicant is one normally provided by common carriers and that the proposed service is not contract carriage, (9) that applicant is financially fit to provide the service, (10) that the proposed service can be conducted economically, and (11) that since shipper supports this application and requires similar third morning service from applicant from Denver applicant's statements that it provides such service are substantiated.

Applicant is a common carrier by motor vehicle authorized to transport, over irregular routes, meats, meat products, and meat byproducts, from Denver to Washington, D.C., New York, N.Y., and Boston, Mass. By using sleeper-cab equipment applicant serves Boston from Denver on a third morning basis and, accordingly, expects to render a similar service from Greeley to the most distant points involved in this application. Although its authorized service from Denver to the above-mentioned eastern cities is a one-way movement, applicant balances its operations by transporting commodities exempt from our economic regulation and by leas-

ing its vehicles and drivers to certificated carriers for westbound movements. Applicant expects to balance the proposed operation in a like manner, and based on his present experience in transportation and past experience in the food produce industry, applicant's president estimated that nearly all of its vehicles would be utilized in return movements, even though at present it has no definite agreements with other motor carriers or producers of "exempt" commodities at the destinations involved. Deadhead operations will be conducted if necessary.

Applicant now operates 20 tractors and 23 trailers and has its office, terminal, and maintenance facilities at Denver. If this application is granted, applicant will establish a terminal with trailer cleaning facilities at Greeley, using local garages for vehicle maintenance, and will obtain, by purchase or lease, sufficient additional equipment to handle the involved traffic. Purchases of equipment assertedly will be financed by loans from Denver banks with which it has established credit and by the sale of stock. At present applicant has no definite commitments either with banks for loans or with potential purchasers of its stock, but it believes loans will be obtained and that a number of persons are interested in purchasing the stock. Applicant's balance sheet as of June 30, 1959, shows total assets of $311,776, including current assets of $58,241, total liabilities of $220,220, including current liabilities of $42,544, and total capital and retained earnings of $91,560. For six months ended June 30, 1959, applicant's operations yielded a net income of $14,215.

Capital Packing Company[2] at the time of hearing, in September 1959, was constructing a new slaughterhouse at Greeley at which it expects to process 15,700,000 pounds of meat, meat products, and meat byproducts monthly. Based on its experience at the Denver plant, shipper expects to ship from Greeley, approximately 50 percent of its total production to points in States in the northeastern portion of the considered destination territory, 45 percent to points in the remaining States considered herein, and 5 percent to points in States not involved in this application. Shipper submitted a list of 147 points in this considered territory to which it now ships from the Denver plant and four points to which it has sought, but has been unable to obtain, a motor carrier service from Denver. Shipper asserts that it will ship to all these destinations from the Greeley plant and to additional points, although none were specified.

Of the total production at the Greeley plant, 65 to 70 percent will move by rail, 1 percent by private motor carriage and the balance by for-hire motor carriers. Rail service, while it will be used extensively, is not entirely satisfactory because of the need for (1) a more competitive, expeditious delivery service in some instances, (2) split deliveries to customers with limited storage facilities, and (3) service to customers located at off-rail points. With respect to motor carrier services, shipper desires a more expeditious service than is

2. Capital Packing Company of Denver and Capital Packing Company of Greeley are affiliated corporations, the stockholders of the former company being stockholders in the latter together with additional shareholders, and since they are engaged in the same business to the same extent with similar transportation needs and since the experiences of the Denver company are relied on in support of the application by the Greeley company, for convenience and clarity of discussion no distinction will be made between the two companies herein.

generally available from existing motor carriers because (1) generally, its products are perishable, volume items, and because of competition subject to demands from customers for prompt, responsive service, (2) it deals extensively in kosher meats which must be delivered within 72 hours to avoid the additional delay and expense of washing the meat enroute to destination, and (3) such a service would enable both shipper and its customers to take advantage of market conditions and reduce speculation due to fluctuating prices. Because of commodity requirements and loading facilities at the Greeley plant, shipper desires 35 to 40 foot, mechanically refrigerated, insulated, sideloading trailers, equipped with longitudinal meat rails, floor racks, and meat hooks. Shipper's support of this application is based on its belief that the motor carrier service available at Denver is insufficient to meet its present needs at that point, that the majority of the carriers authorized to serve Denver are not authorized to serve Greeley directly, and that interline service is generally unsatisfactory. Shipper cited a number of instances in which certain of the protestants were unable to transport shipments from Denver to points they are authorized to serve because they had no equipment available at the time requested by shipper. However, so far as the record discloses it appears that each shipment reached its destination satisfactorily and in no instance does it appear that shipper experienced loss or serious inconvenience because of a lack of motor carrier service. While shipper expresses a general dissatisfaction with interline service, it admitted that if sufficient, suitable equipment were made available to it at Greeley and the service was otherwise responsive to its needs it would use the services of several carriers serving Gree-

ley that interline with other motor carriers at Denver to serve points in this considered destination territory.

In view of our conclusions herein a detailed discussion of the authority held by protestants and the services provided by them is deemed unnecessary. Collectively protestants provide service from Denver to many of the 147 destination points to which shipper now has shipments from Denver, and they desire to participate in the considered traffic. Those protestants having no authority to provide service from Greeley directly to the considered points would interline at Denver with carriers authorized to provide service between Greeley and Denver and would make their equipment available to shipper by leasing it to the interlining carriers. These protestants operate large fleets of equipment and are able to obtain additional equipment if necessary. Although no one of the protestants is able to provide shipper with a complete service, they desire to participate in the considered traffic to the extent of their respective authorities.

The protesting rail carriers offer service to numeous points in the considered destination States, either directly or through interline arrangements. They have available sufficient equipment, both owned and leased, to meet shipper's needs, and are all desirous of participating in the traffic from the Greeley plant when such traffic becomes available. The Union Pacific Railroad, which serves Greeley directly, has discussed the construction of a siding at the new plant with shipper, and is willing to build whatever facilities may be necessary. It will interline with other rail carriers in order that shipper might have available a service to all points which it presently serves by rail from Denver.

It is fundamental that existing carriers should be afforded an opportunity to transport all traffic which they can handle adequately, efficiently, and economically. As noted, shipper has been able to move its products satisfactorily from Denver to 147 of the 151 points to which it now ships or has sought to ship from Denver. While shipper has been unable at times to obtain equipment from a protesting carrier at Denver, we are not convinced that on the whole motor carrier service is inadequate or unsatisfactory from that point. The protesting carriers now serving shipper from Denver, with the exception of applicant, are willing to interchange vehicles with those carriers operating between Denver and Greeley, and since this service has not been tried by shipper and there is no substantial basis for finding that this type of service is inadequate or unsatisfactory, we are compelled to conclude that shipper has an adequate motor carrier service available from Greeley to those points to which it now ships from Denver with the exception of Washington, D.C., Boston, and New York City, which are served by applicant. Since any additional points to which shipper intends to move its products, with the exceptions hereinafter described, are not specified, we are unable to determine that existing service to those points is inadequate.

As for Washington, D.C., Boston, and New York City, applicant is now serving shipper from the Denver plant to those points, and in our opinion it should also be authorized to serve shipper's transportation needs to those points from Greeley. None of the protestants can serve these points directly from Denver. In addition, shipper has sought, but has been unable to obtain a satisfactory motor carrier service to New Haven, Savannah, Lexington, and Knoxville, and no protestant is

able to provide a reasonably direct service to those points. Rail service is not completely adequate to meet shipper's needs for transportation service and accordingly we conclude that applicant has shown a need for its proposed service from Greeley to the above-mentioned points.

We find no merit in the contentions of protestants relating to applicant's financial fitness to conduct the proposed operations and to the economic feasibility of these operations. First, applicant has been conducting similar operations from Denver at a profit, and there is no apparent reason why it could not do likewise from Greeley. While it relies to some extent on the transportation of "exempt" commodities and the leasing of its equipment to other authorized carriers for return movements there is nothing unlawful in such activities and applicant has demonstrated that the proposed operations can be economically conducted. Second, assuming there is a question of applicant's financial fitness to provide shipper with a complete service under the recommended grant of authority, in our opinion there can be no doubt that applicant is financially able to obtain sufficient equipment to provide service within the scope of the authority granted herein. Its assets considerably exceed its liabilities and, as previously noted, it has been operating at a profit. Accordingly, we conclude that applicant is fit, financially and otherwise, to conduct the proposed operations to the extent set forth in our findings herein.

We find that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle in interstate or foreign commerce, over irregular routes, of meat, meat products, and meat byproducts as described in Subsec-

tion A of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 and 766, from Greeley, Colo., to New Haven, Conn., Savannah, Ga., Lexington, Ky., Boston, Mass., New York, N.Y., Knoxville, Tenn., and Washington, D.C.; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that a certificate authorizing such operations should be granted; and that the application in all other respects be denied.

Upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the act and with our rules and regulations thereunder within the time specified in the order entered concurrently herein, an appropriate certificate will be issued.

An appropriate order will be entered.

COMMISSIONER WEBB, dissenting in part:

I would grant the application to the extent recommended by the examiner.

The supporting shipper desires a complete motor carrier service from its new packing house at Greeley, Colo. from which a substantial volume of traffic will move to the involved destination territory. The shipper testified that the interline service provided by protesting carriers from its Denver plant was unsatisfactory and the examiner so found.

In my opinion, this shipper should not be required to use joint-line service which would involve leases of equipment by carriers authorized to serve Greeley from protestant carriers authorized to serve only a portion of the destination territory from Denver. Moreover, pro-

testants are unable to serve collectively some of the destination points involved. The denial of single-line service in the transportation of perishable commodities on the ground that shipper has not experimented with three-line service is clearly not justified.

No. MC-113678 (Sub-No. 7)

APPENDIX (TO DIVISION REPORT)

EXAMINER'S RECOMMENDED TERRITORY

From Greeley, Colo., to Birmingham, Mobile, and Montgomery, Ala., Phoenix and Tuscon, Ariz., Little Rock, Ark., Milford and Wilmington, Del., Indianapolis, Ind., Wichita and Topeka, Kans., Louisville and Lexington, Ky., Baton Rouge, Lake Charles, and New Orleans, La., Portland, Maine, Biloxi, Miss., Oklahoma City, Okla., Baltimore, Landover, and Salisbury, Md., Detroit and Grand Rapids, Mich., St. Louis and Kansas City, Mo., Reno and Las Vegas, Nev., Manchester, N.H., Albuquerque, Gallup, and Santa Fe, N. Mex., Philadelphia, Pittsburgh, and Scranton, Pa., Olneyville and Providence, R.I., Memphis, Nashville, and Knoxville, Tenn., Ogden, Provo, and Salt Lake City, Utah, Richmond and Norfolk, Va., Charleston and Fairmont, W. Va., Cudahy, Madison, and Milwaukee, Wis., and points in California, Connecticut, Florida, Georgia, Massachusetts, New Jersey, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Washington, and the District of Columbia.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the 16th day of February, A.D. 1961.

No. MC-113678 (Sub-No. 7)

CURTIS, INC., EXTENSION - GREELEY, COLO.

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application, except to the extent granted in said report, be, and it is hereby, denied.

And it is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 217, and 221(c) of the act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made in said report shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, Division 1.

Harold D. McCoy,
Secretary.

(SEAL)

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the 28th day of June A.D. 1961.

No. MC-113678 (Sub-No. 7)

CURTIS, INC. EXTENSION - GREELEY, COLO.
(Denver, Colo.)

Upon consideration of the record in the above-entitled proceeding, and of:

1. Petition of applicant, filed April 6, 1961, for reconsideration;
2. Joint reply by Kroblin Refrigerated Xpress, Inc., Sooner Freight Lines, Inc., and Ringsby Truck Lines, Inc., protestants, filed April 25, 1961;
3. Joint reply by Denver-Albuquerque Motor Transport, Inc., Frederick A. Bethke, Buckingham Freight Lines, Buckingham Transfer, Inc., and Buckingham Express, Inc., protestants, filed April 25, 1961;

and good cause appearing therefor:

It is ordered, That the said proceeding be, and it is hereby, reopened for reconsideration on the present record.

By the Commission, Division 1.

Harold D. McCoy,
Secretary.

(SEAL)

APPENDIX D

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION

No. MC-113678 (Sub-No. 7)

CURTIS, INC., EXTENSION - GREELEY, COLO.

Decided August 22, 1961

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 1, COMMISSIONERS WALRATH, WEBB AND TUCKER,

WEBB, COMMISSIONER:

By application filed June 26, 1959, as amended, Curtis, Inc., of Denver, Colo., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of meats, packinghouse products, and commodities used in packinghouses from Greeley, Colo., to points in Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and the District of Columbia and of empty containers on return. A number of rail and

motor carriers oppose the application.[1]

The examiner recommended that the applicant be granted authority to transport, over irregular routes, meats, meat products, and meat by products, as described in Subsection A of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, 766, from Greeley, Colo., to Birmingham, Mobile and Montgomery, Ala., Phoenix and Tucson, Ariz., Little Rock, Ark., Milford and Wilmington, Del., Indianapolis, Ind., Wichita and Topeka, Kans., Louisville and Lexington, Ky., Baton Rouge, Lake Charles, and New Orleans, La., Portland, Maine, Biloxi, Miss., Oklahoma City, Okla., Baltimore, Landover, and Salisbury, Md., Detroit and Grand Rapids, Mich., St. Louis and Kansas City, Mo., Reno and Las Vegas, Nev., Manchester, N.H. Albuquerque, Gallup, and Santa Fe, N. Mex., Philadelphia, Pittsburgh and Scranton, Pa., Olneyville and Providence, R.I., Memphis, Nashville, and Knoxville, Tenn., Ogden, Provo, and Salt Lake City, Utah, Richmond and Norfolk, Va., Charleston and Fairmont, W. Va., Cudahy, Madison, and Milwaukee, Wis., and to points in California, Connecticut, Florida, Georgia, Massachusetts, New Jersey, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Washington, and the District of Columbia.

In the prior report herein, decided February 16, 1961, division 1 granted the application in part: that is to

1. Buckingham Transportation, Inc., Buckingham Express, Inc., Buckingham Transfer, Inc., Denver-Albuquerque Motor Transport, Inc., Frederick A. Bethke, doing business as Bethke Truck Lines, Watson Bros. Transportation Co., Inc., Centennial Truck Lines, Inc., Ringsby Truck Lines, Inc., Kroblin Refrigerated Xpress, Inc., Sooner Freight Lines, Inc., Pacific Intermountain Express Co., Class I Railroads in Western Truck Line Territory, and the Pacific Southwest Railroad Association hereinafter called Buckingham Transportation, Buckingham Express, Buckingham Transfer, Denver-Albuquerque, Bethke, Watson Bros., Centennial, Ringsby, Kroblin, Sooner, PIE, and rail carriers, respectively.

New Haven, Conn., Savannah, Ga., Lexington, Ky., Boston, Mass., New York, N.Y., Knoxville, Tenn., and Washington, D.C. Upon consideration of a petition filed by applicant and joint replies by Kroblin, Sooner and Ringsby, and Denver-Albuquerque, Bethe, Buckingham Transportation, Buckingham Express and Buckingham Transfer, the proceeding was reopened for reconsideration on the present record. Since the pertinent facts are set forth in some detail in the prior report, no useful purpose would be served by repeating them here.

On petition applicant contends that the application should have been granted to the extent recommended by the examiner. In joint replies thereto protestants urge us to deny the application in its entirety because of the adequacy of existing service. We have reviewed the record in the light of these contentions.

Here, in brief, the supporting shipper seeks a complete motor carrier service from its new packinghouse at Greeley. Based on its Denver operations it anticipates that a substantial volume of the involved traffic will move to the destination territory sought in the application. The only available service, however, is interline, which is the type of service that protestants provide either at Denver or at other connecting points. After examining the record we have no difficulty in reaching the same conclusion as did the examiner with respect to the inadequacy and unsatisfactory nature of existing services. Protestants could originate the described traffic only through interlining with connecting carriers which have made no showing as to their respective operations or their ability to perform the service required by the shipper. Affirmative proof of the originating carrier's operations and services is

required except in unusual circumstances not here present. See *Don's Trucking, Inc., Common Carrier Application*, 73 M.C.C. 243, 246-247; and *Roy O. Wetz Ext.-Ferroalloys*, 81 M.C.C. 778, 780.

Furthermore, for competitive marketing reasons shipper requires at least third morning delivery at all destinations. But protestants, whose operations involve circuitous routings or multiple handlings, cannot provide the required expedited service. And since this traffic is new traffic, a grant of authority will have no material effect on existing carriers.

In our opinion this shipper should not be required to experiment with joint-line service which would involve leases of equipment from protestants by carriers authorized to serve Greeley, particularly when such carriers are authorized to serve only a portion of the destination territory from Denver. But even collectively protestants are unable to serve some of the destination points. Shipper's experience with these carriers from its Denver plant, moreover, appears to be something less than satisfactory on joint-line service. In these circumstances denial of single-line service in the transportation of the involved perishable commodities on the ground that multiple-line service has not been tried clearly is not justified. We conclude, therefore, that the application should be granted to the extent described in our findings herein.

On reconsideration, we find that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle in intestate or foreign commerce, over irregular routes, of meat, meat products, and meat byproducts as described in Subsection A of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C.

209 and 766, from Greeley, Colo., to Birmingham, Mobile and Montgomery, Ala., Phoenix and Tuscon, Ariz., Little Rock, Ark., Milford and Wilmington, Del., Indianapolis, Ind., Wichita and Topeka, Kans., Louisville and Lexington, Ky., Baton Rouge, Lake Charles, and New Orleans, La., Portland, Maine, Biloxi, Miss., Oklahoma City, Okla., Baltimore, Landover and Salisbury, Md., Detroit and Grand Rapids, Mich., St. Louis and Kansas City, Mo., Reno and Las Vegas, Nev., Manchester, N.H., Albuquerque, Gallup and Santa Fe., N. Mex., Philadelphia, Pittsburgh and Scranton, Pa., Olneyville and Providence, R.I., Memphis, Nashville and Knoxville, Tenn., Ogden, Provo and Salt Lake City, Utah, Richmond and Norfolk, Va., Charleston and Fairmont, W. Va., Cudahy, Madison and Milwaukee, Wis., and points in California, Connecticut, Florida, Georgia, Massachusetts, New Jersey, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Washington, and the District of Columbia; that applicant is fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; and that a certificate authorizing such operations should be granted.

Upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the act and with our rules and regulations thereunder within the time specified in the order entered concurrently herein, an appropriate cetificate will be issued.

An appropriate order will be entered.

COMMISSIONER WALRATH, dissenting in part:

I am unable to agree that there is a need for service more extensive than that described in the prior report.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the 22nd day of August, AD. 1961.

No. MC-113678 (Sub-No. 7)

CURTIS, INC., EXTENSION - GREELEY, COLO.

It appearing, That on February 16, 1961, the Commission, division 1, made and filed its report and order in the above-entitled proceeding denying in part the said application;

It further appearing, That upon consideration of the record and of petition of applicant for reconsideration and several joint replies thereto of protestants, by order of June 28, 1961, the proceeding was reopened for reconsideration on the present record;

And it is further appearing, That reconsideration of the matters and things involved has been given and that the said division, on the date hereof, has made and filed a report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the report and order of February 16, 1961, are hereby referred to and made a part hereof:

It is ordered, That the said order of February 16, 1961, be, and it is hereby vacated and set aside;

It is further ordered, That the said application, except to the extent granted in said report, be, and it is hereby, denied.

And it is further ordered, That unless compliance is made by applicant with the requirements of Sections 215, 217, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or

within such additional time as may be authorized by the Commission, the grant of authority made in said report shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, division 1.

HAROLD D. McCOY,

Secretary

(SEAL)

APPENDIX E

DECISION AND ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, (Commissioners Webb and Tucker dissent), held at its office in Washington, D.C., on the 14th day of May, 1962.

No. MC-113678 (Sub-No. 7)

CURTIS INC., EXTENSION - GREELEY, COLO.
(Denver, Colo.)

It appearing, That on February 16, 1961, the Commission, division 1, made and filed its report and order in the above-entitled proceeding denying in part the said application;

It further appearing, That upon reconsideration, on August 22, 1961, the Commission, division 1, made and filed its report and order reversing in part the conclusions and findings of the prior report and vacating and setting aside the above-mentioned order;

It further appearing, That upon consideration of the record, of several joint petitions for reconsideration and a joint petition for rehearing or further hearing by protestants and of a reply thereto by applicant, by order of April 2, 1962, the proceeding was reopened for reconsideration on the present record, and the petitions were denied in all other respects;

And it further appearing, That reconsideration has been given of the application and the record in the above-entitled proceeding, including the report and recommended order of the examiner, the exceptions and replies thereto, the report and order of the Com-

mission, division 1, decided February 16, 1961, the petition and replies thereto, the report and order of the Commission, division 1, on reconsideration, decided August 22, 1961, the petitions of Kroblin Refrigerated Express, Inc., Sooner Freight Lines, Inc., Ringsby Truck Lines, Inc., Denver-Albuquerque Motor Transport, Inc., Buckingham Freight Lines, Inc., Buckingham Transfer, Inc., and Buckingham Express, Inc., protestants, for reconsideration, and the replies to these petitions by applicant, and that these petitions and replies thereto raise no new or material matters of fact or law which were not adequately disposed of in the report of the Commission, division 1, decided February 16, 1961, and are not of such nature as to require the issuance of a report by the Commission discussing the evidence in the light of such pleadings:

Wherefore, and good cause appearing therefor:

On reconsideration we find, That the evidence considered in the light of the petitions and replies thereto does not warrant a result different from that reached by the Commission, division 1, in its report and order of February 16, 1961, and that the statement of facts, the conclusions, and the findings therein as set forth in the appendix hereto, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That the order on reconsideration of August 22, 1961, described in the second appearing paragraph above, be, and it is hereby, vacated and set aside;

It is further ordered, That the application, except to the extent granted herein, be, and it is hereby, denied;

It is further ordered, That upon compliance by applicant with the requirements of sections 215, 217, and

221(c) of the Interstate Commerce Act, and with our rules and regulations thereunder, within the time specified in the last paragraph herein an appropriate certificate will be issued.

And it is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made herein shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission.

Harold D. McCoy,
Secretary

(SEAL)

APPENDIX

No. MC-113678 (Sub-No. 7)

CURTIS INC., EXTENSION - GREELEY, COLO.

SERVICE AUTHORIZED:

Operation as a common carrier by motor vehicle, in interstate or foreign commerce, over irregular routes, of meat, meat products and meat byproducts as described in Subsection A of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 and 766, from Greeley, Colo., to New Haven, Conn., Savannah, Ga., Lexington, Ky., Boston, Mass., New York, N.Y., Knoxville, Tenn., and Washington, D.C.

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No. 1033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

CURTIS, INC., and MONFORT PACKING CO.,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, DENVER-ALBUQUERQUE MOTOR TRANSPORT, INC., and RINGSBY TRUCK LINES, INC.
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

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May, 1964

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1033

CURTIS, INC., and MONFORT PACKING CO.,
Appellants,
v.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, DENVER-ALBUQUERQUE MOTOR TRANSPORT, INC., and RINGSBY TRUCK LINES, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(e) of the Revised Rules of this Court, the Appellees Denver-Albuquerque Motor Transport, Inc., and Ringsby Truck Lines, Inc., respectfully move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a Three-Judge District Court convened pursuant to 28 U.S.C. 2284 and 2325, which dismissed an action brought by the Appellant Curtis, Inc., seeking to set aside and enjoin the enforcement of certain orders of the Interstate Commerce Commission entered by that agency in a proceeding entitled *"Curtis, Inc., Extension—Greeley, Colo., No. MC-113678 (Sub-No. 7)".*[1]

[1] The opinion of the District Court is reported at 225 F. Supp. 894, and has been reproduced in Appendix A of the *Jurisdictional Statement*. The decisions of the Commission are not officially published, but the reports thereof have been reproduced in Appendices B through E, inclusive, of the *Jurisdictional Statement*.

Because of the procedural question urged by the Appellants before this Court, a brief resume of the disposition of the matter before the Commission is warranted at this point.

The proceedings before the Commission had their genesis in an application filed June 26, 1959 by Appellant Curtis, Inc., pursuant to Section 207 of the Interstate Commerce Act,[2] seeking a certificate of public convenience and necessity to authorize the transportation of meats and related commodities, as a common carrier in interstate commerce, over irregular routes, from Greeley, Colorado, to *all points* in 37 states and the District of Columbia. A public hearing on the application was held at Denver, Colorado, on September 24, 1959, before an Examiner of the Commission. In addition to a description of the proposed transportation by Curtis, testimony in support of the application was furnished by Capitol Packing Company,[3] an operator of a slaughterhouse and meat packing plant at Greeley, Colorado. Appearing in opposition to the application were 11 certificated motor carriers, including Appellees Denver-Albuquerque and Ringsby, together with numerous railroads, all of which introduced evidence calculated to establish the adequacy of existing transportation services.

By a Report and Recommended Order served January 25, 1960, the Examiner recommended that the application be granted, in substantial part, including area-wide destinations in 13 states and the District of Columbia and numerous specified destinations in the other 24 states embraced within the application.[4] Curtis filed no exceptions concerning the partial denial of the application. Exceptions to the authority recommended were filed, however, by a number of the opposing carriers, including Appellee Denver-Albuquerque.

On February 16, 1961, the Commission, acting by Division 1,[5] issued its Report and Order in which, differing

[2] 49 U.S.C. 307.

[3] The predecessor in interest of Appellant Monfort Packing Company.

[4] *Jurisdictional Statement*, Appendix B, p. 50.

[5] Consisting of Commissioners Murphy, Webb, and Herring, with Webb dissenting (*Jurisdictional Statement*, Appendix C).

with the recommendations of the Examiner, it granted the application only to the extent of authorizing the proposed operations from Greeley to 7 specified destination cities.[6] The application in all other respects was denied. Curtis filed a petition for reconsideration, to which replies were filed on behalf of several protestants, including Appellees Denver-Albuquerque and Ringsby.

On August 22, 1961, the Commission, acting by Division 1,[7] issued its Report and Order on Reconsideration, vacating the prior order of February 16, 1961 and granting the application to the same extent originally recommended by the Examiner. Petitions for reconsideration were filed this time by a number of the protesting carriers, including Appellees Denver-Albuquerque and Ringsby.

By a Decision and Order issued May 14, 1962, the Commission, acting in General Session,[8] vacated the prior report of Division 1 on reconsideration and reinstated the original February 16, 1961 report of Division 1.[9] A certificate was accordingly granted to Curtis, subject to compliance with applicable sections of the Act, to the same limited extent as had been previously granted by Division 1 in its original report and order.[10] The Appellants contend in their "Statement of the Case" that this last decision and order by the Commission was entered "without making any findings of fact or conclusions of law."[11] Such a reading of the Commission's decision and order is untenable, and ignores the plain wording and effect of the following provision:

> "*On reconsideration we find*, That the evidence considered in the light of the petitions and replies thereto does not warrant a result different from that

[6] New Haven, Conn., Savannah, Ga., Lexington, Ky., Boston, Mass., New York, N. Y., Knoxville, Tenn., and Washington, D. C. (*Jurisdictional Statement*, Appendix C, p. 65).

[7] Consisting of Commissioners Walrath, Webb and Tucker, with Walrath dissenting. The opinion was written by Commissioner Webb, who had dissented from the original report. The composition of Division 1 had changed since the original report, and Commissioner Webb was the only Commissioner participating in both of the reports by Division 1 (*Jurisdictional Statement*, Appendix D).

[8] Consisting of the entire membership of 11 Commissioners, with Commissioners Webb and Tucker dissenting (*Jurisdictional Statement*, Appendix E, p. 76).

[9] *Ibid*, pp. 76-78.

[10] *Ibid*, pp. 77-78; tootnote 6, *supra*.

[11] *Ibid*, p. 7.

reached by the Commission, division 1, in its report and order of February 16, 1961, and that the statement of facts, the conclusions, and the findings therein as set forth in the appendix hereto, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own."[12]

A final petition for reconsideration by Curtis was denied by the Commission on November 2, 1962, and the action on review before the District Court ensued. Appellant Monfort Packing Co. intervened before the District Court in support of the complaint, and Appellees Denver-Albuquerque and Ringsby intervened as defendants in support of the Commission's decision and order. The District Court received briefs and heard oral arguments on behalf of all the parties, and by an opinion filed January 28, 1964, unanimously upheld the decision and order of the Commission and dismissed the complaint.

The Appellants' *Jurisdictional Statement*, on appeal to this Court, was received by the Appellees Denver-Albuquerque and Ringsby on April 20, 1964. Accordingly pursuant to Rule 16 of the Revised Rules of this Court, it is deemed that the due date for filing the instant motion to affirm is on or before May 20, 1964.

ARGUMENT

This case involves no question of novel or general significance. Both of the questions stated by the Appellants have been thoroughly briefed, argued, considered, and resolved before the District Court, and that Court's unanimous holdings thereon are fully in harmony with prior decisions and principles announced by this Court. To demonstrate the lack of substance in the pair of questions brought by this appeal will require only brief exposition, presented according to the design of the *Jurisdictional Statement*.

[12] *Ibid*, Appendix E, p. 77. The Appellants themselves necessarily recognize that the Commission in its decision and order of May 14, 1962 "adopted" the findings of the prior Division 1 report of February 16, 1961, and that, therefore, the "Commission's ultimate decision in this matter must stand or fall on the correctness of this earlier order." (*Ibid*, p. 9).

Question 1 Is Unsubstantial

The brunt of Appellants' argument in support of the first question stated by them goes to the substantiality of evidence upon which the Commission acted. Thus, it is argued that the Commission acted arbitrarily and unreasonably because, it is said, "the availability of any type of service from existing carriers, was entirely speculative", that the availability of such service was in part "based upon allegedly available interline arrangements", that such service "may be entirely unavailable or completely unsuitable", and so forth to the same effect.[13]

The purpose of such an argument is at odds with fundamental principles governing review by this Court. It is now beyond argument that in cases such as this the Court will not concern itself with the weight of evidence upon which the Commission acted, nor with the correctness of the Commission's reasoning and conclusions, nor with the wisdom or expediency of the order, nor whether, on like evidence, the Court would have made a similar assessment.[14] "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."[15]

The Appellants' argument, as phrased under the first question, attacks the factual validity of the Commission's findings to the effect that "shipper has an adequate motor carrier service available from Greeley" to all but 7 of the destinations required.[16] Basic to a sure understanding of that determination is the theory of the very evidence which was offered in support of the application. At the time of the hearing, the shipper was constructing a new plant at Greeley. A similar plant had been operated for a number of years by the shipper at Denver, approximately 55 miles away. The shipper evidence in support of a future need for transportation from the Greeley plant proceeded on the expressed notion that the operations of that plant, in-

[13] *Jurisdictional Statement*, pp. 10, 11, 15.

[14] *United States v. Carolina Freight Carriers Corporation*, 315 U.S. 475, 482-484; *Virginian Railway Company v. United States*, 272 U.S. 658, 665-666; *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U.S. 541, 547.

[15] *Mississippi Valley Barge Line v. United States*, 292 U.S. 282, 286-287.

[16] *Jurisdictional Statement*, Appendix C, p. 63.

cluding how it would "handle the traffic" from there, would be "exactly as we operate the Denver Plant" (Transcript, 36-37). In support of this, as the Commission's report of February 16, 1961 reflects in some detail, the shipper introduced into evidence a list of 147 points in the involved territory to which it was apparently making satisfactory shipments from Denver, together with 4 additional destinations to which it allegedly had been unable to obtain service.[17] As the Commission correctly stated, "Shipper asserts that it will ship to all these destinations from the Greeley plant and to additional points, although none were specified."[18]

It is altogether clear from the evidence of record that both Curtis and its supporting shipper based their case before the Commission upon the premise that the extent of prospective need for service from Greeley, and the involved estimate of the adequacy of existing service from that point, could and should be foretold on the basis of the shipper's experience with existing carriers from Denver. Such being the gist of the evidence presented, the Commission's conclusion that the shipper would have adequate service from Greeley, except to 7 of the specifically involved destinations, flowed rationally from findings that the shipper had been able "to move its products satisfactorily from Denver" to the remaining specified destinations via existing carriers other than Curtis; that those existing carriers which operated from Denver but could not serve the Greeley origin directly "are willing to interchange vehicles with those carriers operating between Denver and Greeley", and that "this service has not been tried by shipper and there is no substantial basis for finding this type of service is inadequate or unsatisfactory."[19]

---

[17] In identifying that exhibit, the shipper witness, referring to the 4 destinations of New Haven, Savannah, Lexington, and Knoxville, explained:

"We have requested service to these points and have not been able to handle them presently. These are the points that we would like to have the service available that we are not servicing now" (Transcript 40-41; Exhibit 4). The certificate ultimately issued by the Commission in this proceeding authorized service to the 4 named destinations, plus 3 other destinations which Curtis was already authorized to serve from Denver. The remaining 144 destinations referred to by the shipper were admittedly being served by other existing carriers.

[18] *Jurisdictional Statement*, Appendix C, p. 60.

[19] *Ibid*, Appendix C, p. 63.

Appellants themselves acknowledge that their first question in this appeal requires a redetermination of "whether the record provided any reasonable basis for the above stated findings."[20] The true posture of this aspect of their appeal is therefore seen as an attempt to relitigate essentially factual issues which are committed by statute to the jurisdiction of the Commission.[21]

On applications such as this "forecasts as to the future are necessary to the decision."[22] The District Court so recognized and held that the necessary prediction "could be rationally made upon the evidence before the Commission", and that it, therefore, "must follow that the Commission's finding that the shipper '. . . has an adequate service available from Greeley to those points to which it now ships from Denver' is supported by substantial evidence."[23] This is manifestly so upon the basis of the record considered in its entirety, and Appellants' appeal on this question should accordingly be halted at the threshold.[24]

Even if the Court should choose to inquire into the merits of the conclusion reached by the Commission concerning the adequacy of existing service, the arguments advanced by the Appellants are not well taken. The Appellants' key line of attack is ultimately directed against the "availability of any type of service from existing carriers" at Greeley, particularly through interline connections at Denver,[25] and the supposed failure of the protesting carriers to allege or affirmatively prove "that they were able to provide service to the entire destination area through these interline arrangements."[26]

As to the availability of interline connections between Greeley and Denver, the Appellants would have it appear that all of the opposing carriers would depend upon such

[20] *Ibid.* p. 9.

[21] *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535-536.

[22] *United States v. Detroit, etc. Navigation Co.*, 326 U.S. 236, 241.

[23] *Jurisdictional Statement*, Appendix A, pp. 36-37.

[24] Cases cited at footnotes 14, 15, 21, *supra*.

[25] The concepts of "interlining", and "interchanging", and their commonplace occurrence in the regulated operations of motor carriers, were recognized by this Court in *Gilbertville Trucking Co., Inc. v. United States*, 371 U.S. 115, 122 (note 2).

[26] *Jurisdictional Statement*, pp. 10-16.

connections to render destination service. Such is not the case. Among the protestant carriers, for example, Ringsby Truck Lines, Inc., Buckingham Transportation, Inc., Pacific Intermountain Express Co., and Watson Brothers Transportation Co., all are authorized to operate from the Greeley origin directly and to provide single-line service to a great number of the involved destinations; through interchange, these carriers are authorized to initiate shipments from Greeley which would span the continental scope of the application.[27]

With respect to the other protesting carriers whose operations covered the remaining destinations specified by the shipper, but which were not authorized to initiate traffic at Greeley, affirmative proof was made of interline connections from Greeley to Denver. Bethke Truck Lines and Centennial Truck Lines, two certificated short-line carriers operating between Greeley and Denver, both introduced evidence establishing their willingness and ability to originate the involved traffic at Greeley and interline or exchange such traffic with the other carriers operating from Denver.[28] The supporting shipper testified that there was no known reason why such interline connections could not be used by it.[29]

To contend, as the Appellants do, that it was necessary for the opposing carriers to allege and affirmatively show how they would provide service "to the entire destination area", is to cavil. Although Curtis sought authority to transport the involved traffic to *all* points in 37 states and the District of Columbia, it is fundamental that the burden of proof is upon the applicant to show precisely what service is required by public convenience and necessity, and that burden involves an affirmative showing not only of what extent of service is necessary but also that existing facilities are inadequate to such extent.[30]

As seen, the evidence offered in support of the applica-

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[27] Transcript 135-139, 149, 152, 164-166, 170-176, 213-215; Exhibits 9-12, 14-15, 23-27.

[28] Transcript 112-113, 159.

[29] Transcript 69, 80-81.

[30] *Hudson Transit Lines, Inc. v. United States* (D.C., N.Y., 1948) 82 F. Supp. 153, Aff'd *per curiam* 338 U.S. 802.

tion positively limited the showing of the extent of service required to 151 specified points. The evidence of the opposing carriers was primarily designed to establish the adequacy of existing service to those destinations actually put in issue by the applicant, and could not reasonably have been expected to negative a need for service to all other conceivable destinations in the extensive, virtually nationwide territorial ambit of the application as filed. The evidence adduced in support of the application also, as previously pointed out, acknowledged that service was available from existing carriers other than the applicant to all but 7 of the considered destinations. As the Commission properly concluded, there was no proof of material inadequacy in existing service to the remaining 144 destinations shown to be involved. Significantly, Curtis does not now allege that the Commission's findings concerning adequacy of existing service to any one of the specific destinations involved are without substantial support in the record. The *reductio ad absurdum* of the argument which is made concerning an alleged lack of evidence of existing service to all points in the "entire destination area" of 37 states is manifest, and the entire point begs the real question of public convenience and necessity based upon the limited extent of service shown by the evidence to be required.

Appellants attempt to make such of the circumstance that a particular destination area carrier, with whom one of the protesting carriers might interline traffic for ultimate delivery, did not appear at the hearing.[31] In the same vein, the Appellants urge that this Court should hold that the failure of certain carriers to follow through in their opposition after the hearing by filing exceptions should be regarded as a lack of continued interest in the proceeding.[32] Both of these arguments are wide of the mark, and imply a fundamental misconception of the nature of proceedings before the Commission. It is "public" convenience and necessity, not the conflicting, private interests of competing carriers, which occupies the arena before the Commission. The Commission, with repeated judicial approval, has consistently held that the statute requires an affirmative showing

[31] *Jurisdictional Statement*, 12-13.
[32] *Ibid*, 9-10.

by the applicant that the proposed service is or will be required by present or future public convenience and necessity,[33] and no such showing may be presumed from the failure of existing motor carriers, let alone all possible connecting carriers, to oppose the application.[34]

Entirely aside from the statutory policy requiring competent proof of public convenience and necessity even in the absence of any protests by existing carriers, the District Court laid bare the logical deficiency of the Appellants' claim that the failure of some carriers to file exceptions to the authority initially recommended indicated a lack of continuing interest, as being an "inference drawn from a fact susceptible to other inferences", and a theory which "would place a burden of practically interminable litigation upon every existing [carrier] which decided to protest an application." [35]

The Appellants' reliance on the Commission decisions cited at pages 9 and 10 of the *Jurisdictional Statement* is misplaced. To be sure, such decisions may stand for the proposition that in certain circumstances the Commission has regarded a failure of an existing carrier to except to a recommended grant of authority as tending to indicate that such carrier may "not be adversely affected by the requested authority." [36] But that is an entirely different matter from saying that such lack of participation may be used by an applicant to fill a gap in its own case of establishing proof that there is a public need for the proposed operation that cannot adequately be met by existing carriers. In each of the decisions relied upon by the Appellants, a reading will disclose that there was independent proof by the applicant showing public convenience and necessity. None of such cases is in conflict in any way with the en-

[33] *Hudson Transit Lines, Inc. v. United States* (D.C., N.Y., 1948) 82 F. Supp. 153, 157, Aff'd. *per curiam* 338 U.S. 802; *Quickie Transport Co. v. United States* (D.C., Minn., 1959) 169 F. Supp. 826, Aff'd. *per curiam* 361 U.S. 36.

[34] See, for example: *Motor Vanway*, 17 M.C.C. 314, 316; *Thomas Boyd*, 20 M.C.C. 533, 534; *Burlington Transportation Company* 43 M.C.C. 729, 736, Aff'd. *Burlington Transportation Company v. United States* (D.C., N.D., Ill., May 9, 1946, not officially reported) 5 Fed. Carriers Cases Para. 81, 320; *Carl Subler Trucking, Inc.*, 77 M.C.C. 395, 398; *Robbins Motor Transportation v. United States* (D.C., Pa., 1962) 204 F. Supp. 78, 82; *Colorado-Arizona-California Express, Inc. v. United States* (D.C., Colo., 1963) 224 F. Supp. 894, 899-900.

[35] *Jurisdictional Statement*, Appendix A, p. 34.

[36] *Ibid*, p. 10.

trenched principle, properly applied here, that the applicant's burden of proof cannot be overcome simply by showing that all possible existing carriers may not have testified, or by reference to the circumstance that one or more protestants may have abstained from filing exceptions or replies after the hearing.[37]

The Commission decisions relied upon by Appellants in support of their claim that service available through interline arrangements must be proven are similarly inapposite. The short answer is that evidence concerning the requisite interline arrangements was introduced. As previously shown, evidence concerning the interline bridge between Greeley and Denver was furnished by the two short-line carriers which would actually make that connection. With respect to interline connections in the destination territory, the carriers which would perform the initial or intermediate transportation fully identified the delivering carriers which would be involved, described the operating authority held by such carriers, and explained, chiefly by reference to documentary exhibits introduced into evidence, how and to what points the interline service would be provided. Appellants now conveniently overlook the fact that they offered no objection to the receipt in evidence of either the testimony or exhibits pertaining to interline arrangements.[38]

Appellants also conveniently overlook the fact that their own evidence served to confirm that existing service was available from Denver, either direct or through interline, to all but 4 of the involved destinations. Neither at the hearing, nor now, have the Appellants pointed to a single, specific destination to which a need for service has been established which is not available from one or more existing

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[37] Cases cited at note 34, *supra*. Also in point is the recent decision by this Court in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, which invalidated the issuance of common carrier operating rights granted by reference to the disinclination of existing carriers to provide service rather than "within the bounds of the standard of 'public convenience and necessity'."

[38] See, for example, the introduction of evidence by Kroblin Refrigerated Express concerning its interline service with Indiana Refrigerator Transport, which evidence is now disputed at pages 12 and 13 of the *Jurisdictional Statement* (Transcript 185-187; Exhibit 29).

carriers.[39] That was, and is, the fatal flaw of their case before the Commission, and cannot be cured on review by attempts to shift the burden of proof or sift the weight of evidence.

Question 2 Is Unsubstantial

Appellants' argument on the prior question tends to get in the way of their argument here. Under the first question, it is apparent that they had no difficulty in recognizing that "the reasoning underlying the Commission's denial of substantially all of Appellants' application was expressed in the Division 1 Order of February 16, 1961".[40] This obviously, because it was recognized that the decision and order by the entire Commission, entered May 14, 1962, "adopted this earlier finding without qualification or amplification."[41] Proceeding to their second question raised on appeal, however, the Appellants assert that the Commission's decision and order of May 14, 1962, which denied substantially all of the application, contravenes Section 8(b) of the Administrative Procedure Act[42] "by failing to include a statement of findings and conclusions, as well as the reasons therefor."[43]

The point is, that in the first instance the Appellants have recognized and addressed their arguments to, "findings" within the orthodox sense of the Administrative Procedure Act, while in the present instance, the Appellants complain about a lack of "findings" in the sense of subjective mental processes of the Commissioners participating.

In the relevant portion of the Commission's final decision and order, which is incompletely quoted by Appellants at page 16 of the *Jurisdictional Statement*, a majority of 9 of the 11 Commissioners, "affirmed and adopted as our

[39] The circumstance that direct, single-line service may not be available from Greeley to each of the involved destinations is not in itself critical. "The national transportation policy does not tolerate the thought that all shippers at all points are entitled to single-line motor carrier service." *Hancock Trucking, Inc.*, 62 M.C.C. 513, 535; accord: *Consolidated Freightways*, 83 M.C.C. 421; *Ayer v. United States* (D.C., Ga., 1956) 139 F. Supp. 440, 443-444; *Colorado-Arizona-California Express, Inc. v. United States* (D.C., Colo., 1963) 224 F. Supp. 894, 898.

[40] *Jurisdictional Statement*, p. 8.

[41] *Ibid.* p. 8-9.

[42] 5 U.S.C. 1007(b).

[43] *Jurisdictional Statement*, p. 16.

own", the "statement of facts, the conclusions, and the findings" set forth in the earlier report and order by the Commission, Division 1, on February 16, 1961.[44] The Commission recites that such action was taken because, "*On reconsideration we find*, That the evidence considered in the light of the petitions and replies thereto does not warrant a result different from that reached" in the February 16th report and order.[45] After adopting that report and order, the Commission accordingly "vacated and set aside" the August 22, 1961 intermediate report and order on reconsideration.[46]

As "affirmed and adopted" by the entire Commission, the statement of facts, the conclusions, and the findings contained in the February 1961 report stand exactly as if they had been reiterated verbatim in the final decision and order. The Appellants stop short of suggesting that the Commission has thereby failed to furnish *objective* "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record". The Administrative Procedure Act requires no more. The Congressional purpose of that Act was not to exact a form of literary exercise from administrative agencies, but to insist on sufficient disclosure of the basis of an order.[47]

If the final decision and order of the Commission and the "adopted and affirmed" February 16, 1961 report and order are read together, as was clearly intended by the Commission, both the parties and this Court are furnished a concrete basis for understanding the reasoning of the administrative adjudication. This should end inquiry concern-

[44] *Jurisdictional Statement*, Appendix E, p. 77.

[45] *Ibid*, p. 77.

[46] *Ibid*, p. 77.

[47] In *T.S.C. Motor Freight Lines, Inc. v. United States* (D.C., Tex., 1960) 186 F. Supp. 777, 787, Aff'd. *sub nom Herrin Transp. Co. v. U. S.*, 366 U.S. 419, it was said, in circumstances parallel with the instant case:

"The Administrative Procedure Act does not require that detailed findings with supporting reasons previously made and adhered to by the Commission be reiterated after each attack. The statement by the Commission that the 'findings of the Commission [are] in accordance with the evidence and applicable law' is obviously a statement that the Commission is standing behind its original detailed and articulate findings and conclusions. The law requires no more."

ing the sufficiency of "findings" within the conventional meaning of the Administrative Procedure Act.

The fact that the Commission finally "adopted and affirmed" the findings of the February 1961 report and order, by reference, rather than slavishly repeating or paraphrasing them, is certainly not grounds for valid objection. The use by the Commission of such short-form decisions and orders, adopting and affirming a prior report or recommended report, has been sanctioned in a number of decisions on review.[48] There is nothing inconsistent therewith in any of the three District Court opinions cited by Appellants,[49] and none of those cases is remotely equivalent to the instant matter. The crucial distinction between the cases which Appellants rely upon, and the present case, is that, as the District Court below pointed out, "in none of these cases in which the courts reversed summary vacations of prior orders, did the vacating orders have a prior reasoned opinion to fall back upon and to adopt as its own."[50] In no instance, did the final orders in the cases cited by Appellants *contain or incorporate* any findings whatever. They are therefore profoundly different from this case.

The Appellants tend to concede that a short-form decision incorporating a prior report, such as used here, may be an "entirely satisfactory and permissible method" in the ordinary case, but contend that it is defective here in view of the prior "conflicting decisions rendered by Division 1". The short answer to this is that the Court is not concerned with the consistency or inconsistency of Commission decisions. *Virginian Railway Co. v. United States*, 272 U.S. 658. As the District Court properly concluded, "review can extend only to the Commission's final, definitive report and order of May 14, 1962, and not to the preliminary stages or

[48] *T.S.C. Motor Freight Lines, Inc. v. United States* (D.C., Tex., 1960) 186 F. Supp. 777, Aff'd *sub nom Herrin Transportation Co. v. United States*, 366 U.S. 419; *City of Philadelphia v. United States* (D.C., Pa., 1961) 197 F. Supp. 832; *Yale Transport Corp. v. United States* (D.C., N.Y., 1962) 210 F. Supp. 862; *North American Van Lines, Inc. v. United States* (D.C., Ind., 1963) 217 F. Supp. 837.

[49] *Amarillo-Borger Express v. United States* (N.D., Tex., 1956), 138 F. Supp. 441, judgment vacated as moot, 352 U.S. 1028; *Long Island R. Co. v. United States* (D.C., N.Y., 1956) 140 F. Supp. 823; *Dixie Carriers, Inc. v. United States* (D.C., Tex., 1956) 143 F. Supp. 844 (*Jurisdictional Statement*, p. 20).

[50] *Jurisdictional Statement*, Appendix A, p. 38-39.

preparatory steps. *Long Transportation Corp. v. United States* (S.D., Calif., 1948) 75 F. Supp. 915." [51]

In the last analysis, boiled down to its essence, the Appellants' argument concerning "findings" is that the Commission's final decision and order is unlawful because it does not recite what mental processes or subjective reasoning on the part of the Commissioners culminated in the adoption of the February 1961 report rather than the August 1961 report. Such psychoanalysis of the administrative process was never contemplated by the Administrative Procedure Act, nor has it ever been a legitimate object of judicial review. The Commission, of course, has statutory authority to "reconsider" prior action, and to reverse, change, or modify its prior decision.[52] Where, as here, the ultimate decision and order on reconsideration adopts a prior reasoned report which sets out a sufficient basis for the action taken, "there is no requirement that the Commission specify the weight given to each item of evidence or fact or disclose mental operations by which its decisions are reached." [53]

[51] *Jurisdictional Statement*, Appendix A, p. 39.

[52] 49 U.S.C. 1, (6) and (7).

[53] *Baltimore & O. R. Co. v. United States* 298 U.S. 349, 359; *Morgan v. United States* 304 U.S. 1, 18; *Morgan v. United States*, 313 U.S. 409, 422; *Chicago, Burlington & Quincy R. Co. v. Babcock* 204 U.S. 585, 593.

CONCLUSION

PREMISES CONSIDERED, the Appellees Denver-Albuquerque Motor Transport, Inc. and Ringsby Truck Lines, Inc. respectfully submit that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Respectfully submitted,

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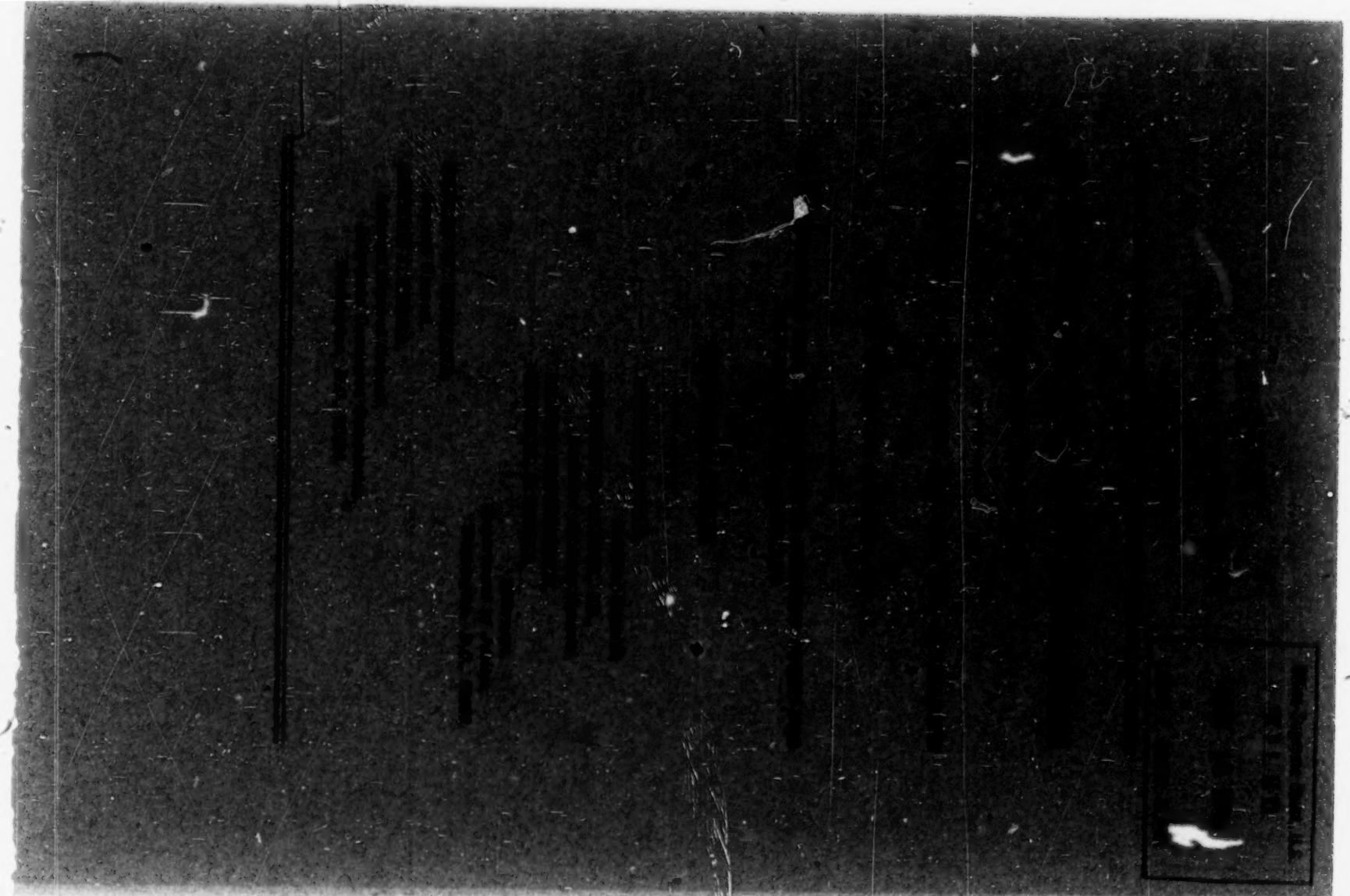

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1033

CURTIS, INC., AND MONFORT PACKING CO., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court, convened pursuant to 28 U.S.C. 2325, dismissing an action brought to set aside an order of the Interstate Commerce Commission. The order (a) granted appellant Curtis authority to extend its existing motor carrier operations so as to carry meat, meat products and meat byproducts between Greeley, Colorado, and seven eastern points,

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and (b) denied it authority to serve other destinations from Greeley.

In 1959 Curtis applied under Section 207(a) of the Interstate Commerce Act, 49 U.S.C.A. 307(a), for a certificate of public convenience and necessity authorizing it, through direct single-line motor vehicle service, to transport meat and other packinghouse products between Greeley, Colorado, and 151 points in 37 States and the District of Columbia. The application was supported by Capitol Packing Company ("Capitol") (the predecessor of appellant Monfort Packing Company). Capitol was constructing a large meat packing plant in Greeley, which Curtis proposed to serve. Capitol planned to ship 30–35 percent of the output of the Greeley plant by for-hire motor carrier, and most of the remainder by rail (J.S. 32, 60). The application was opposed by motor and rail carriers, all of whom provide transportation over some part of the route requested by Curtis, and by a railroad association. In combination, the existing motor carriers can provide service to 147 of the 151 points in question (J.S. 63).

The Commission's Division I, by order dated February 16, 1961, granted Curtis' application insofar as it sought to serve seven eastern points, and denied the remainder of the application on the ground that the existing carriers could adequately meet Capitol's need for service to the other points (J.S. 53–68). Upon reconsideration, another panel of Division I granted Curtis the entire authority requested (J.S. 69–75).

On further reconsideration the entire Commission (two members dissenting) reinstated the February 16

decision of Division 1 granting authority to serve only seven points. Ruling that all material matters of law and fact had been adequately dealt with in the February 16 report and order, the Commission "affirmed and adopted [that report] as our own" (J.S. 76–78).

The three-judge district court unanimously upheld the order (J.S. 25–40; 225 F. Supp. 894). The court held that "since the evidence in the record is ample to show that all of the destination points in controversy could be served with reasonably adequate speed and volume by the existing carriers, * * * the Commission did not err in holding that * * * Curtis failed to meet the demands of proof of convenience and necessity" (J.S. 37). The court further held that the Commission, in adopting the Division's report, did not violate Section 8(b) of the Administrative Procedure Act (J.S. 39).

ARGUMENT

This appeal presents no substantial question warranting plenary review by this Court. It involves only (1) the correctness of the Commission's factual determination, affirmed by the district court, that appellant Curtis had failed to show the need for all the service proposed; and (2) the form in which the Commission rendered its decision.

1. Appellant contends (J.S. 9–16) that the record fails to support the Commission's finding that existing motor carriers are capable of meeting the transportation needs of Capitol, the supporting shipper. The decision whether additional motor carrier service is necessary to serve the public convenience and neces-

sity is within the discretion of the Commission.' *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65. Plainly, as the district court held, the Commission did not abuse its discretion in the instant case.

It is not disputed that through interlining the existing motor carriers can provide service for Capitol from its Greeley plant to 147 of the 151 points for which Curtis requested authority (J.S. 32-33, 63). Nor is it disputed that Capitol has never in the past been seriously inconvenienced by using the service of existing carriers for shipment of its products from its plants in Denver to those points (J.S. 33). The record further shows that the protesting motor carriers which can serve those points have access to adequate equipment if they are required to supplement their existing large fleets of trucks; and that the intrastate carriers, which will carry shipments from Greeley to Denver and there interline with the interstate carriers, can also secure additional equipment (J.S. 34, 63). Both interstate and intrastate carriers are prepared to, and desirous of, performing the service for Capitol (J.S. 34, 63).[1]

Although Capitol has indicated that it would prefer a single-line direct route between Greeley and each of the points in question, it has also stated that it is willing to use existing facilities if such service satisfies its needs (J.S. 61–62). Moreover, as the Commission noted, where existing carriers in combination

[1] Appellants argue (J.S. 9–10) that proof of the willingness and ability of four of the protesting motor carriers to provide service to Capitol (see *e.g.*, R. 158–160) must be ignored because those carriers did not file exceptions to the hearing examiner's report. As the district court demonstrated (J.S. 34), this argument is without substance.

can provide adequate service, a shipper's preference for new single-carrier service does not determine whether public convenience and necessity requires such additional service (J.S. 61–63).

The burden is on the applicant to show that the public convenience and necessity require the proposed service, and a principal element in meeting this burden is proof of the inadequacy of existing facilities (*Hudson Transit Lines, Inc.* v. *United States,* 82 F. Supp. 153, 157 (S.D.N.Y.), affirmed, 338 U.S. 802). Interline service may be fully responsive to a shipper's needs, and the existence of such service is a sufficient basis for denying applications to provide new direct-line services. *Ayer* v. *United States,* 139 F. Supp. 440 (N.D. Ga.); *Colorado-Arizona-California Express* v. *United States,* 224 F. Supp. 894 (D. Colo.). The Commission was therefore fully justified in denying the requested authorization except for those destinations as to which Curtis had shown (J.S. 63–65) that existing service would be inadequate. As the court below pointed out, should the interlined service prove inadequate in any respect, Curtis may reapply for additional authority (J.S. 37).

2. Appellants argue (J.S. 16–22) that the entire Commission violated Section 8(b) of the Administrative Procedure Act, 5 U.S.C. 1007(b), because it adopted the initial report, findings and conclusions of Division 1 instead of making its own independent findings. This contention is frivolous. Section 8(b) requires all agency decisions to "include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law,

or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." Appellants do not deny that the report of Division 1 which the Commission adopted satisfies the standards of Section 8(b). There was no need for the Commission to prepare an additional report restating or paraphrasing the Division's findings, conclusions and reasons. *T.S.C. Motor Freight Lines, Inc.* v. *United States,* 186 F. Supp. 777, 787 (S.D. Texas), affirmed, *sub nom. Herrin Transportation Co.* v. *United States,* 366 U.S. 419. As the court below correctly stated (J.S. 39), the Commission "adequately adopted a prior reasoned report which had set out a sufficient basis for the action taken. There was no necessity for further explanation as to the cause of the Commissioners' votes."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

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